No. 78-349

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY HELSTOSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-33a) is reported at 576 F.2d 511. The opinion of the district court (App. D, *infra*, pp. 38a-62a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 34a-35a) was entered on April 13, 1978.

The order of the court of appeals denying the government's petition for rehearing was entered on June 30, 1978 (App. C, *infra*, p. 36a). On July 25, 1978, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including August 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause bars the government from introducing, in the bribery trial of a former Congressman, any evidence that, although not a legislative act, refers to the defendant's past performance of a legislative act.

2. Whether the voluntary giving of testimony and production of documents before a grand jury by a Congressman who is aware of but does not invoke the Speech or Debate Clause privilege constitutes a waiver of that privilege with respect to use of those documents and that testimony at the trial of an indictment returned by the grand jury, when there has been no express authorization by the Congressman of such use.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6 of the Constitution provides in pertinent part:

> * * * for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place.

18 U.S.C. 201 provides in pertinent part:

> (a) For the purpose of this section: "public official" means Member of Congress * * *
>
> * * * * *
>
> "official act" means any decision or action on any * * * matter * * * which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.
>
> * * * * *
>
> (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
>
> (1) being influenced in his performance of any official act * * * [shall be guilty of an offense].
>
> * * * * *
>
> (g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; * * * [shall be guilty of an offense].

STATEMENT

A. The Pre-Indictment Proceedings

The indictment in this case grew out of a series of grand jury investigations in New Jersey inquiring

into corruption in connection with private immigration legislation (App. A, *infra*, p. 5a). These investigations continued for a number of years and have resulted in several indictments and convictions, including those of respondent's former administrative assistant and his brother (*ibid.*). During the investigations, respondent appeared before eight different grand juries on ten separate occasions from April 1974 until May 1976 (*ibid.*). Respondent voluntarily testified before those grand juries about his introduction of private immigration bills. He described in detail his motives for introducing the bills, the procedures by which he presented the bills in the House of Representatives, and the procedures used by his office to deal with private bill requests. He also testified regarding his own purported investigations of charges of fraud and bribery touching the private immigration bills (*ibid.*; C.A. App. 830-863, 944-967).[1] In addition, respondent produced for the grand jury voluminous files relating to the private bills, which included correspondence and copies of the bills themselves. He also testified and produced documents referring to the private bills when he appeared as a defense witness in the trial of his former administrative aide, Albert DeFalco, in October 1975 (App. A, *infra*, pp. 5a-6a).[2]

[1] "C.A. App." designates the five volume appendix filed by the United States in the court of appeals.

[2] DeFalco was convicted of bribery offenses in connection with private immigration legislation and sentenced to a six-year term of imprisonment. *United States* v. *DeFalco*, D., N.J., Crim. No. 75-264, decided October 17, 1975, affirmed, 546 F.2d 419 (C.A. 3), certiorari denied, 430 U.S. 965.

Prior to his first grand jury appearance in April 1974, and on each subsequent appearance, the government advised respondent that he could refuse to answer questions if he believed that to do so might incriminate him. (App. A, *infra*, p. 6a). The government also warned him that he was not under any compulsion to produce documents:

> Of course you understand that if you wish not to present those documents you do not have to and that anything you do present may also, as I have told you about your personal testimony, may be used against you later in a court of law?

C.A. App. 697. To this respondent replied:

> I understand that. Whatever I have will be turned over to you with full cooperation of this Grand Jury and with yourself. * * * I promise full cooperation with your office, with the F.B.I. [and] this Grand Jury. * * * As I indicated, I come with no request for immunity and you can be assured there won't be any plea of the Fifth Amendment under any circumstances.

C.A. App. 697, 699. It was not until respondent's final appearance before the grand jury, in May 1976, that he asserted a Speech or Debate Clause privilege and refused to answer further questions (App. A, *infra*, p. 6a).

B. Proceedings in the District Court

In June 1976 the grand jury returned an indictment against respondent and three members of his congressional staff. Count I of the indictment charged respondent with conspiracy to violate the official bribery statute, 18 U.S.C. 201(c)(1), by acting with others to solicit and receive bribes in return for being influenced to introduce private immigration bills in the House of Representatives. Counts II through IV charged respondent with substantive violations of the bribery statute, alleging that he agreed to receive payments from specified aliens residing illegally in the United States in return for being influenced to introduce private bills in their behalf (App. D, *infra*, p. 39a).[3]

Respondent thereafter moved to dismiss Counts I-IV of the indictment on the ground that they infringed the Speech or Debate Clause. The district court denied respondent's motion to dismiss but held that the Speech or Debate Clause prohibited the government from proving during its case-in-chief the performance by respondent of any past legislative act (App. D, *infra*, pp. 43a-47a, 59a-62a). The government then filed a motion *in limine* seeking specific rulings on whether its proffered evidence, including the legislative files of respondent and the expected oral testimony of certain witnesses, would be admissible at trial. The government argued that respondent

[3] The remaining counts of the twelve-count indictment charged respondent with perjury before the grand jury and obstruction of justice.

had waived his Speech or Debate Clause privilege by his extensive prior disclosures before the grand jury and further contended that its evidence could be admitted without infringing the Speech or Debate Clause because it was offered only to prove respondent's knowledge and purpose in agreeing to accept the bribes.[4]

The district court found that respondent's disclosures before the grand jury had been voluntary and also found that he was aware of the availability of the Speech or Debate Clause privilege when he testified and produced the documents (App. D, *infra*, pp. 48a n. 4, 49a). The district court nonetheless concluded that respondent had not waived his privilege because "[s]uch a waiver may be found only where it has been clearly demonstrated that a legislator has expressly waived his Speech or Debate immunity for the precise purpose for which the Government seeks to use evidence of his legislative acts" (*id.* at 58a). Without ruling on each item of evidence proffered by the government, the district court

[4] The evidence proffered by the government included a narrative offer of proof setting forth the expected testimony of various witnesses in support of each allegation of bribery and conspiracy. The evidence also included more than 200 documents obtained from the files produced by respondent. The district court and the court of appeals ordered these materials placed under seal to protect respondent's right to a fair trial. In this Court, we have filed under seal a special appendix (referred to hereinafter as "Sp. App."), a copy of which has been served on respondent's counsel, containing the government's offer of testimony and also containing representative examples of the documents from respondent's files that were offered in the district court.

also decided that "the Government may not, during its case-in-chief, introduce evidence, derived from any source and for any purpose, of the past performance of a legislative act by defendant Henry Helstoski" (*id.* at 62a).

C. The Decision of the Court of Appeals

On appeal, the Third Circuit affirmed the district court's ruling.[5] In analyzing the scope of the evidentiary privilege, however, the court of appeals went beyond the district court, concluding that the Speech or Debate Clause prohibits the government from introducing any evidence *referring* to a past legislative act:

> The [Supreme] Court has been clear in its prohibition of "any showing" of legislative acts * * *. Legislative acts may not be shown in evidence for any purpose in this prosecution.
>
> Nor may the Government circumvent this clear requirement by introducing correspondence and statements that, though not legislative acts themselves, contain reference to past legislative acts of the defendant. To allow a showing by such secondary evidence could render *Brewster's* [*United States* v. *Brewster*, 408 U.S. 501] absolute prohibition meaningless. * * * To allow proof of legislative acts in such a manner would reduce drastically the effectiveness of the Speech or Debate provision, and would discourage the dissemination to the public of information about legislative activities.

App. A, *infra*, pp. 28a-29a.

[5] Respondent sought mandamus in the court of appeals to review the district court's refusal to dismiss the indictment. The court of appeals denied this relief (App. A, *infra*, pp. 9a-21a), and we of course do not seek review of that part of the court of appeals' decision.

The court of appeals also refused to find a valid waiver in this case despite its recognition that respondent had testified and produced documents voluntarily and with specific knowledge of his right to assert the privilege. The court concluded that, if the privilege could be waived at all, any waiver "must be express and for the specific purpose for which the evidence of legislative acts is sought to be used against the member" (*id.* at 32a).

D. Further Proceedings

Following the decision of the court of appeals, a pretrial conference was held in the district court on August 3, 1978. At this conference the district court declined the government's request to rule in advance of trial on the admissibility, under the court of appeals' decision, of specific items of proffered evidence. The court stated that it would exclude any item of evidence that contained any reference to or would afford any basis for inferring the performance of a past legislative act; the court also indicated that it would exclude evidence of payments of money to respondent subsequent to any legislative act, on the theory that the jury might infer from proof of such payments that respondent had fulfilled his part of the illegal bargain by performing legislative acts.[6]

[6] In the Special Appendix submitted herewith we have indicated the portions of the government's offer of proof that

REASONS FOR GRANTING THE PETITION

Bribery prosecutions of present or former Members of Congress are, fortunately, not commonplace occurrences. When such cases arise, however, they are of an importance disproportionate to their numbers. Moreover, because of the Speech or Debate Clause, prosecutions of federal legislators give rise to unique legal issues regarding the nature and scope of the privilege that the Clause confers.

Because of the importance of prosecutions such as the instant one, it is vital that the constitutional ground rules under which they are conducted be delineated with clarity and that the basic governing principles be set down by the highest court of the land. To date, only two such cases have been decided by this Court: *United States* v. *Brewster*, 408 U.S. 501; *United States* v. *Johnson*, 383 U.S. 169. *Johnson* established that a prosecution could not be sustained when the gravamen of the offense charged was the giving of a speech on the floor of the House, and the charge was proved by a searching inquiry into the preparation of and motives for the speech. *Brewster* established that the Speech or Debate Clause does not bar the prosecution of a charge of receiving a bribe for the performance of a legislative act, so long as the offense could be shown without direct proof of a legislative act. While much of importance was settled by these decisions, neither required a searching examination of the precise scope and con-

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we believe will be excluded at trial on the basis of the court of appeals' decision as construed by the district court.

tent of the evidentiary privilege that accompanies the immunity conferred by the Speech or Debate Clause, and questions of critical importance remain to be settled.

The instant case, we submit, requires consideration by this Court of this important and largely unresolved area. As the district court observed, "the issues presented are of constitutional moment, not only for this case but far beyond it * * *" (App. D, *infra*, p. 41a n. 3). As we set forth more fully below, the position adopted by the court of appeals represents a very expansive view of the privilege—a view that would bar virtually all evidence of relevant events occurring subsequent to the performance of a legislative act. This view would render effective bribery prosecutions of present or former Members of Congress virtually impossible in a large proportion of cases. While we acknowledge that the court of appeals' expansive interpretation of the privilege finds some support in language in the *Brewster* opinion, we submit that the language falls far short of compelling the result reached, and indeed that the principles reflected in *Brewster* and other Speech or Debate Clause cases in fact appear to support admission rather than exclusion of evidence of the type proffered by the government in this case.

In addition, this case presents a related issue of substantial importance regarding the ability of a Member of Congress to waive the evidentiary privilege of the Clause as to materials that otherwise would be inadmissible, and the standards by which the existence and effectiveness of a waiver are to be

assessed. The court of appeals has adopted a standard for waiver virtually unparalleled in stringency elsewhere in the law. The importance of the waiver issue also outstrips the boundaries of the present case, since Members of Congress, as well as prosecutors conducting grand jury investigations, need to know whether the privilege may be waived and, if so, what constitutes an effective waiver.

A. Under the decision of the court of appeals, the prosecution is precluded not only from proving the actual performance of a legislative act, but also from introducing any evidence that refers to the past performance of a legislative act. We believe that this ruling misconstrues the nature of the evidentiary privilege conferred by the Speech or Debate Clause and threatens needless injury to the government's ability to protect the integrity of the legislative process by means of prosecutions under 18 U.S.C. 201 for bribery.

1. The court of appeals has created, in effect, a relatively simple benchmark for assessing the admissibility of evidence in a bribery prosecution of a Member of Congress: evidence showing conversations and actions that precede the performance of a legislative act is admissible; evidence that reflects the occurrence of a past legislative act is inadmissible. Whatever virtues of simplicity such an approach may enjoy, we believe this chronological distinction does not reflect the proper standard for implementing the evidentiary privilege of the Speech or Debate Clause.

To illustrate, the court of appeals would allow the government to offer evidence of statements of the

following kind: "This afternoon I will introduce a private immigration bill in exchange for the $500 that you gave me." But the opinion forbids introduction of statements nearly identical in substance occurring only a few hours later: "I introduced a private immigration bill this afternoon, and I want the $500 that you promised in exchange."[7] Neither statement itself constitutes a legislative act. Forbidding proof of the second statement, while admitting proof of the first, will not advance the goal of congressional independence emphasized by the court of appeals. Neither statement "impugns" or "questions" an act of Congres or "inquires into" the legislative motivation of the Member. Both statements are manifestations of an illegal bribery agreement, and it is that bribery agreement, not the legislative act, that is the subject of inquiry.

Nor is it reasonable to conclude that the second statement, more than the first, invites the jury to infer that a legislative act has actually occurred. The statement of intent to perform a legislative act gives rise to an inference that it occurred, just as a statement of recollection supports such an inference. See

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[7] By precluding any evidence that refers to a past legislative act, the court of appeals has adopted a rule with sweeping implications. Conversations of third parties in furtherance of the bribery conspiracy are often banned. The government apparently cannot even prove that the Congressman received bribes (see p. 9, *supra*) because such receipt is an indirect showing of a past legislative act. Even outright admissions of guilt—"I took a bribe for introducing the bill"—would be precluded by the court's ruling. The consequences of the rule for the present prosecution are shown in the Special Appendix to this petition.

Mutual Life Ins. Co. v. *Hillmon*, 145 U.S. 285, 296; *United States* v. *Annunziato*, 293 F.2d 373, 377 (C.A. 2). In sum, the Third Circuit's ruling makes the admission of evidence turn entirely on the fortuitous timing of the conversations and non-legislative actions of the bribery conspirators, not upon the policies that underlie the Speech or Debate Clause.

The Third Circuit's rule of privilege effectively precludes the admission in this prosecution of substantial portions of the government's proof and, more generally, would result in arbitrary protection for corrupt legislators who are lucky enough (or shrewd enough) to structure their participation in the bribery scheme so that their conversations occur after the legislative performance. In cases such as the present case, where an administrative aide makes initial contact with the potential briber, and the Congressman deals with the briber only after the performance of the legislative act in order to demand or receive payment, there may be insufficient evidence arising before the legislative act to establish that the Congressman was a knowing participant in the illegal scheme. To bar conversations referring to past legislative acts, or, worse, evidence, such as payments of money, that indirectly suggests the occurence of such acts, will make it impossible to obtain convictions in this category of cases.

2. Although the court of appeals believed that its holding was warranted by this Court's decisions in *Johnson* and *Brewster*, and although there are isolated statements in those opinions that look in the direction of the result reached by the court of appeals,

we submit that analysis of this Court's Speech or Debate Clause decisions demonstrates that they do not support that result, but in fact lead to the opposite conclusion—that the evidence described in the government's offer of proof is admissible. Our argument in support of admissibility focuses on the following factors: (1) the acts and conversations in question occurred outside of the congressional sphere and were not part of the due functioning of the legislative process; thus there is no question here, as there was in *Johnson*, of direct proof of a legislative act privileged under the Clause; (2) the evidence is sought to be introduced for the legitimate purpose of proving respondent's state of mind and guilty knowledge in accepting money, and any references to the occurrence of past legislative acts are incidental; (3) proof of the conversations and other occurrences would not "draw into question" or "impugn" any legislative act or "inquire into" respondent's motives therefor.

a. In *Brewster* this Court held that the government could prove that the defendant Congressman had received bribes for the past performance of legislative acts, in violation of 18 U.S.C. 201(g).[8] The Court held that, with respect to such past legislative acts, the government was free to "show that [Senator Brewster] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act." 408 U.S. at 527. The Court confirmed that "an inquiry into the pur-

[8] 18 U.S.C. 201(g) prohibits, *inter alia*, the receipt of bribes "for or because of any official act *performed* * * * by [the Congressman]" (emphasis supplied).

pose of a bribe 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.' " *Id.* at 526. The Court added that "evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury." *Id.* at 527.

This aspect of the *Brewster* decision would be untenable if the court of appeals' chronological criterion for admissibility were sound. The dissenting Justices in *Brewster* were of the view that the Speech or Debate Clause prohibited all prosecutions under Section 201(g) because the government would of necessity have to make reference to the legislation for which the bribe was received. Evidence of the payment of money would not be intelligible (indeed, would not be relevant) without such a reference. See 408 U.S. at 535-536, 553. The necessity of making such a reference, however, did not alter the holding of the majority in *Brewster*.[8a]

b. *Brewster* further establishes that the Speech or Debate Clause "does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative

[8a] Here, as in *Brewster*, it is not an element of the offense to show that the legislative acts for which the payments were accepted actually occurred. For example, if a Member of Congress accepts a bribe for having influenced others to vote for or against a particular measure, it is immaterial under the statute whether he actually exerted such efforts or whether they were effective. Therefore, it is not his legislative acts that are called into question by a prosecution under either Section 201(g) or Section 201(c)(1). See 408 U.S. at 526-527.

process itself." 408 U.S. at 528. For this additional reason, the government should be allowed to inquire into respondent's private conversations, even though such conversations may refer in some manner to legislative activities. Such an inquiry is permissible because "the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *Id.* at 512. The Court also reminded:

> In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process. [408 U.S. at 515-516; footnotes omitted].[9]

[9] The Third Circuit placed principal reliance on language in *Brewster* indicating that *United States* v. *Johnson, supra,* "precludes any showing of how [the Congressman] acted, voted, or decided." 408 U.S. at 527. But while "[i]t is true that the quoted words appear in the * * *opinion, [the court of appeals] takes them out of context." *Brewster, supra,* 408 U.S. at 513. In *Johnson* "the Government questioned [the Congressman] extensively * * * concerning the authorship of the speech, and his motives for giving the speech." The theory of the government's case in *Johnson,* and the focus of its evidence, was the Congressman's improperly motivated speech. See 408 U.S. at 510. Inquiry into the private conversations that furthered the bribery conspiracy in this case cannot be compared to the examination of legislative conduct forbidden in *Johnson.* The holding in *Johnson* was a narrow one, and should not be stretched to the very different facts presented here: "We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us." 383 U.S. at 185.

Because the Speech or Debate Clause "does not extend beyond what is necessary to preserve the integrity of the legislative process" (*id.* at 517), and because "[t]aking a bribe is, obviously, no part of the legislative process" (*id.* at 526), evidence of conversations about the giving and receiving of bribes should not be precluded at trial.[10] The correct approach, in our view, is stated in *United States* v. *Garmatz*, 445 F. Supp. 54, 64-65 (D. Md.):

> [D]iscussions relating to the giving or receiving of a bribe would not be barred at the trial, nor conversations of co-conspirators which might be casually or incidentally related to legislative affairs. * * * The question before this Court when the proffers are made will be whether the government is seeking to introduce direct evidence of the performance of a legislative act as that term was defined in *Brewster* * * * not whether the legislative act in question was performed in the past or in the future.

c. The Third Circuit reasoned that the conversations here involved must be precluded because their use might "discourage the dissemination to the public of information about legislative activities" (App. A, *infra*, p. 29a). But this Court has twice held that even communications having a colorable claim to legitimacy (unlike the conversations of the bribery conspirators here; see, *e.g.*, Sp. App. 6) are not protected by the Speech or Debate Clause if they occur outside of the halls of Congress. In short, mere references to legislative acts have not sufficed to foreclose judicial inquiry.

Thus, in *Gravel* v. *United States*, 408 U.S. 606, 625-629, this Court held that the Speech or Debate Clause did not forbid inquiry into the publication of the contents of the record of a congressional hearing. Far from forbidding any reference to legislative action, this Court stated: "If it proves material to establish for the record the fact of publication [of the Pentagon Papers] at the subcommittee hearing, which seems undisputed, the public record of the hearing would appear sufficient for this purpose." 408 U.S. at 629 n. 18. And in holding that the grand jury could inquire into the subsequent dissemination of these materials, the Court noted (*id.* at 625):

> Here, private publication by Senator Gravel * * * was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence.

As in *Gravel*, the communications that the government here seeks to inquire into occurred outside of the halls of Congress, and the fact that the inquiry may indirectly suggest that certain events occurred in Congress is not fatal because no examination of the legislative performance is required. See also *Doe* v.

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[10] By enacting 18 U.S.C. 201, Congress has "deliberately delegated * * * to the courts" the function of punishing bribery occurring in its ranks, and the congressional prohibition extends to bribes received in payment for past legislative acts. See *United States* v. *Brewster*, *supra*, 408 U.S. at 525, 527. No decision of this Court has barred "a prosecution which, though possibly entailing some reference to legislative acts, is founded upon a 'narrowly drawn' statute passed by Congress in the exercise of its power to regulate its Members' conduct." *United States* v. *Brewster*, *supra*, 408 U.S. at 510. See also *United States* v. *Johnson*, *supra*, 383 U.S. at 185.

McMillan, 412 U.S. 306, 313-318, holding that the dissemination of official congressional committee reports outside of Congress could be inquired into, even though such inquiry would inevitably show that the Committee had issued a report and would show the contents of that report.[11]

In sum, this Court's decisions in *Brewster*, *Gravel* and *Doe* establish that while "a congressman is immune from questioning about his speeches, debates and votes," he may be accountable for "telling the people" outside of Congress "why he spoke and voted as he did." Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1163 (1973). The holding of the Third Circuit here, barring proof of conversations occurring outside of the legislative sphere, thus conflicts with the teachings of this Court's recent decisions.

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[11] In *Doe*, the defendants (including a number of Congressmen) were charged with invasion of privacy by reason of their public distribution of a report that stated on its face that it was an "Investigation and Study of the Public School System of the District of Columbia (Report of the Committee on the District of Columbia, House of Representatives), H.R. Rep. No. 91-1681, 91st Cong., 2d Sess." See *Doe* v. *McMillan*, 459 F.2d 1304, 1307 n. 2 (C.A.D.C.). Merely glancing at the report that was the subject of the controversy would reveal to the jury a past legislative act. Although the Congressmen in *Doe* were absolved because they had not participated in the public distribution, it is clear from the Court's opinion that "[i]nasmuch as the printing and distribution of committee reports to the general public were unprotected external communications, even the members of Congress would not have protection if they personally engaged in the performance of such acts." Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 Suffolk U. L. Rev. 1019, 1039 (1974).

B. Respondent voluntarily produced for the grand jury a number of documents that the prosecution now seeks to introduce in evidence at trial.[12] He did so with knowledge that he could withhold them and assert his privilege under the Speech or Debate Clause (App. D, *infra*, pp. 48a-49a), and after having been advised that the documents could be used against him in a criminal prosecution (App. A, *infra*, p. 6a). On each occasion that respondent appeared before the grand jury, he was represented by experienced counsel who had also represented him in a prior case in which respondent did assert the Speech or Debate Clause privilege (App. D, *infra*, p. 48a n. 4). Despite his opportunity to assert the privilege, respondent pledged full cooperation with the government and the grand jury and expressly asserted that "I come with no request for immunity * * *" (C.A. App. 699). Respondent and his counsel sought a tactical advantage by voluntarily producing the requested documents and testifying before the grand jury. By this cooperation, respondent sought to free himself of suspicion, stating to the grand jury that he had taken vigorous steps to investigate and "ferret out" bribery and corruption (C.A. App. 830, 834-836, 944-948).

By declining to find a waiver of the privilege in these circumstances, the Third Circuit departed from

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[12] The vast majority of these documents were copies of letters sent by respondent to persons seeking private immigration legislation (Sp. App. 12-17, 21-25). Copies of bills introduced by respondent were also produced (Sp. App. 13-14). We assume, *arguendo*, that these documents constitute legislative acts that could not be proved without violation of the Speech or Debate Clause in the absence of a waiver of the privilege of the Clause.

the holding of the Seventh Circuit in *United States* v. *Craig*, 528 F.2d 773, 780-781.[13] And by requiring an express waiver for the precise purpose that the evidence is sought to be used—and concluding that respondent's voluntary production under the circumstances did not satisfy that standard—the court of appeals has for all practical purposes eliminated the possibility of waivers of the privilege.[14]

The resolution of the waiver question raises an important issue of constitutional law of continuing signifiance in bribery prosecutions that merits review by this Court. Members of Congress appearing before grand juries should be able to predict whether their testimony and production of documents amounts to a waiver of the Speech or Debate Clause privilege, and government attorneys conducting such investigations are also entitled to authoritative guidance in deter-

[13] *Craig* held that a state legislator could waive his speech or debate immunity by testifying voluntarily before the grand jury. Although the Seventh Circuit dealt with a state legislator, its analysis rested upon this Court's decisions under the federal Speech or Debate Clause. The Seventh Circuit, sitting *en banc*, subsequently vacated the original panel decision on other grounds. 537 F.2d 957. The waiver holding was thereby mooted, but never questioned or set aside.

[14] Short of a written declaration of waiver, formally renouncing the privilege as to each intended use of each item of evidence, it is difficult to determine what would satisfy the Third Circuit's standard. This Court has recently described the "knowing and intelligent waiver" standard as "extraordinary" in nature. *Garner* v. *United States*, 424 U.S. 648, 657. By refusing to give effect even to a knowing and intelligent waiver here, the Third Circuit has surpassed even the exacting standard that this Court has reserved for cases involving waivers of rights central to the integrity of the trial process.

mining what is required to accomplish a valid waiver of the privilege.

Although there is little explicit authority on the waiver issue, the Speech or Debate Clause privilege is generally recognized to be a personal privilege available to individual congressmen to safeguard their independence. *Coffin* v. *Coffin*, 4 Mass. 1, 27 (Sup. Ct.); *In re Grand Jury Proceedings*, 563 F.2d 577, 582 (C.A. 3); *Powell* v. *McCormack*, 395 U.S. 486, 505; see also *United States* v. *Brewster*, *supra*, 408 U.S. at 547 (Brennan, J., dissenting). Congressmen may therefore waive the personal privilege, as this Court stated in *Gravel* v. *United States*, *supra*, 408 U.S. at 622 n. 13.[15] Applying the teaching of *Gravel*, the Seventh Circuit concluded both that the privilege could be waived and that the appropriate waiver standard was simple "voluntariness." The waiver in this case, which was both voluntary and intelligent, is more than sufficient to satisfy the standard prescribed in *Craig*.

The waiver standard applicable to a particular constitutional guarantee depends upon the purpose of that guarantee. See *Schneckloth* v. *Bustamonte*, 412

[15] In enacting the official bribery statute, 18 U.S.C. 201, Congress has promulgated a narrow provision punishing bribery by its members and has deliberately delegated the trial function to the courts. *United States* v. *Brewster*, *supra*, 408 U.S. at 525. The statute condemns bribes for past legislative performances as well as future performances. Nothing in the statute suggests that Congress, as an institution, has withheld consent to examine relevant evidence of the bribery offenses denounced by it.

U.S. 218, 235-237, 241-246; *Garner* v. *United States*, 424 U.S. 648, 653-658. A waiver standard stricter than necessary to serve the purpose of the guarantee, however, is not appropriate. *Ibid.* The Speech or Debate Clause serves a number of important purposes, but none of them necessitates the extraordinary waiver standard fashioned by the Third Circuit here. The Clause protects legislators from distraction from the performance of their legislative duties that may result from litigation (*Powell* v. *McCormack*, 395 U.S. 486, 505); it also protects Congressmen from questioning and punishment for their legislative acts (*United States* v. *Johnson*, *supra*, 383 U.S. at 180); and it protects the integrity of the legislative process by insuring the independence of individual legislators (*United States* v. *Brewster*, *supra*, 408 U.S. at 507).

A Congressman wishing to avoid the distraction of defending himself, to avoid inquiry into his legislative acts, and to assert his independence as a legislator is free to do so by claiming the privilege in appropriate cases. Had respondent desired to claim the protections of the Speech or Debate Clause, he could have done so, and accordingly no value implicit in the Clause is impaired by giving recognition to his knowing and voluntary relinquishment of those personal protections. To permit a Congressman to attempt to gain a tactical advantage by disclosing relevant documents, and then to withdraw them after his strategy has failed, would defeat the ends of criminal justice without contributing to the independence of the legislature that the Speech or Debate

Clause was intended to secure. See *United States* v. *Nixon*, 418 U.S. 683, 708-709; *United States* v. *Nobles*, 422 U.S. 225, 230-231, 239-240.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

ANDREW L. FREY,
Deputy Solicitor General.

STEPHEN M. SHAPIRO,
Assistant to the Solicitor General.

AUGUST 1978.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1423

UNITED STATES OF AMERICA, APPELLANT

v.

HELSTOSKI, HENRY

(D.C. Crim. No. 76-201-1, D. of N.J.)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

No. 77-1800

HENRY HELSTOSKI, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

HONORABLE H. CURTIS MEANOR,
United States District Judge, NOMINAL RESPONDENT

ON PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION

Argued October 6, 1977

Before SEITZ, *Chief Judge*, STALEY and HUNTER,
Circuit Judges.

OPINION OF THE COURT

(Filed April 13, 1978)

SEITZ, *Chief Judge.*

Henry Helstoski ("defendant"), a former United States Congressman, petitions for a writ of mandamus to compel the district court to dismiss Counts I-IV of a pending indictment against him. He seeks dismissal on the grounds, inter alia, that those counts contravene the Speech or Debate Clause of the United States Constitution. That Clause provides that "[t]he Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place." *U.S. Const.* art I, § 6.

In a separate appeal arising from this prosecution of defendant, the Government challenges a pretrial order of the district court forbidding the Government to introduce during its case-in-chief "evidence of the performance of a past legislative act on the part of the defendant, Henry Helstoski, derived from any source and for any purpose." *United States* v. *Helstoski*, No. 76-201 (D. N.J., Feb. 23, 1977) (pretrial order).

The defendant was indicted along with several other persons in June of 1976 by a grand jury in New Jersey. At the time of the indictment, and at all times during which the indictment charged that the defendant violated the law, the defendant was a Member of Congress representing the Ninth Congressional District in New Jersey.

Count I charges the defendant with violation of the conspiracy statute, 18 U.S.C. § 371 (1976). The count alleges that while he was a Member of Congress the defendant conspired to violate the official bribery statute, 18 U.S.C. § 201(c)(1),[1] by acting with others to solicit and obtain bribes from resident aliens in return for being influenced in the performance of official acts to benefit those aliens.

The conspiracy count defined the official acts for which bribes allegedly were paid to defendant as being "the introduction of private bills in the United

---

[1] 18 U.S.C. § 201 (1976) provides in pertinent part:

> (a) For the purpose of this section:
>
> "public official" means Member of Congress . . . ; and
>
> . . . .
>
> "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.
>
> . . . .
>
> (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
>
> (1) being influenced in his performance of any official act; or
>
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States;
>
> . . . .
>
> Shall be [guilty of an offense].

States House of Representatives." In addition, four of the sixteen overt acts set out in Count I alleged that the defendant introduced specific bills into the House to benefit specific individuals. For example, Overt Act 13 charged that "[o]n or about September 6, 1973, the defendant, HENRY HELSTOSKI, introduced a private bill in the United States House of Rep-representatives for Luis and Maria Echavarria."

Counts II-IV charged the defendant with substantive violations of 18 U.S.C. §§ 201(c)(1) & (2) (1976).[2] Each count alleged that while a Congressman the defendant solicited and agreed to receive payments from specified aliens in return for being influenced in the performance of official acts. Each count specified the official acts at issue. For example, Count IV charged:

> From on or about January 11, 1975, to on or about January 18, 1975, in East Rutherford, New Jersey, the defendant, HENRY HELSTOSKI, directly and corruptly asked, demanded, solicited, sought and agreed to receive cash payments from Luis and Maria Echavarria in return for his being influenced in the performance of an official act, to wit: the introduction of a second private bill in the United States House of Representatives on behalf of Luis and Maria Echavarria, which private bill was introduced by the defendant, HENRY HELSTOSKI, on January 27, 1975.

---

[2] See note 1, *supra*.

This indictment grew out of a complex investigation by several federal grand juries in New Jersey into allegations of political corruption and fraud in immigration matters. These investigations continued for several years, and thus far have resulted in several indictments and convictions, including those of the defendant's former administrative assistant and the defendant's brother.

During these investigations the defendant appeared before eight different grand juries on ten separate occasions from April of 1974 until May of 1976. He testified and produced documents both voluntarily and in response to subpoena. That testimony and those documents concerned a variety of issues, including the defendant's personal finances and spending habits, as well as concerning the introduction of private bills by the defendant.

The defendant testified before these grand juries voluntarily and in detail about his introduction of private immigration bills. He described his motive for introducing the bills. He testified about the procedures by which he presented the bills to the House and to the proper committees, and he detailed how his office dealt with private bill requests. He also testified about his own investigation into allegations of fraud in connection with the bills.

In addition the defendant produced for the grand juries voluminous correspondence and files relating to the private bills at issue. The documents produced by defendant included copies of the bills themselves.

The defendant also testified and produced documents about these private bills when he testified in the trial of his former administrative assistant, Albert DeFalco, on October 15, 1975.

Prior to his first appearance before a grand jury in April, 1974, and upon each subsequent appearance, the Government told the defendant that he could refuse to answer questions or produce documents if he believed that to do so might incriminate him. The Government warned him that any information he did offer could be used against him. Upon each occasion the Government also informed the defendant that he had the right to confer with legal counsel and that an attorney would be provided for him if he could not afford one.

At no time did the Government speak to the defendant about his rights under the Speech or Debate Clause. And though the district court found that when the defendant first appeared before the grand jury he knew of his Speech or Debate privilege as a result of other unrelated litigation,[3] it was not until the defendant's final appearance before the grand jury on May 14, 1976, that the defendant asserted his Speech or Debate Clause privilege in refusing to answer the grand jury's questions. The defendant did not testify about, or produce documents

[3] In *Schiaffo* v. *Helstoski*, 492 F.2d 413 (3d Cir. 1974), the defendant relied upon his Speech or Debate privilege in defending a civil suit alleging abuse of the franking privilege. The attorney who represented defendant in *Schiaffo* also represented him when he appeared before the various grand juries.

concerning, legislative acts subsequent to the May 14, 1976, assertion of privilege.

After the district court severed those eight counts in the indictment that named only Helstoski as a defendant, the defendant moved to dismiss Counts I-IV on the ground they contravened the Speech or Debate Clause in that they called legislative acts into question. Alternatively, the defendant sought dismissal on the ground that the indictment was invalid because the grand jury heard evidence in violation of the Speech or Debate Clause.

The Government opposed the motion on the grounds that the Speech or Debate Clause did not invalidate the indictment and that, in any event, the defendant had waived his Speech or Debate rights by voluntarily testifying before the grand jury.

The district court denied defendant's motion in a bench opinion. *United States* v. *Helstoski*, No. 76-201 (D. N.J., Feb. 1, 1977) (bench opinion). The court rejected the Government's waiver argument and it held that the indictment was not inconsistent with the Speech or Debate Clause. The court also held that the Speech or Debate Clause prohibited the Government from proving during its case-in-chief the performance of any past legislative act by the defendant.

The Government then filed a motion with the district court seeking specific rulings on whether 23 categories of evidence would be admissible at trial. The categories comprised evidence of actual bills in-

troduced by defendant, evidence of payments to defendant, and evidence of conversations and correspondence that referred to the introduction of the private bills at issue.

The Government renewed its waiver argument in support of these offers of proof. Alternatively, it urged the district court to find the offers admissible on the grounds they were offered to prove defendant's purpose and intent in agreeing to accept the bribe, and not offered to question legislative acts.

After oral argument on the Government's offer of proof the district court issued a written opinion. That opinion also set forth the court's prior oral rulings on defendant's earlier motion to dismiss. *United States* v. *Helstoski*, No. 76-201 (D. N.J., 22, 1977) (unpublished opinion). The court said again that it believed the indictment valid under the Speech or Debate Clause, and refused to dismiss the first four counts. The court repeated its holding that the defendant had not waived his privilege, since there had been no express waiver of the type the district court believed was required by the important principles supporting the Speech or Debate privilege.

In response to the Government's offer of proof the district court restated its prohibition on proving any past legislative acts. It found it unnecessary to rule specifically on any of the 23 proffered categories, but held the Speech or Debate Clause to be an absolute bar to the introduction into evidence of legislative acts for any purpose.

On February 23, 1977, the district court issued an order embodying its judgment on the motions before it. It denied the defendant's motion to dismiss, and stated the limitations on the presentation of evidence of legislative acts:

> The United States may not, during the presentation of its case-in-chief at the trial of the above Indictment, introduce evidence of the performance of a past legislative act on the part of the defendant, Henry Helstoski, derived from any source and for any purpose.

United States v. *Helstoski*, No. 76-201 (D. N.J., Feb. 23, 1977) (pretrial order).

The Government timely appealed from the February 23, 1977, order, asserting that this court has jurisdiction over the appeal under 18 U.S.C. § 3731 (1976). On June 17, 1977, the defendant petitioned this court for a writ of mandamus directing the district judge to dismiss the first four counts of the indictment. The cases were consolidated for disposition.

I.

Defendant's Petition for a Writ of Mandamus

The defendant invokes the jurisdiction of this court under the All Writs Act, 28 U.S.C. § 1651 (1970), seeking a writ of mandamus to compel the district judge to dismiss the four counts of the indictment charging defendant with agreeing to accept money in return for promising to perform legislative acts.

Defendant argues that his entitlement to the writ is clear. He argues that for the district court to try him on this indictment would violate the Speech or Debate Clause and thus would constitute a clear abuse of judicial power. In addition the defendant argues that since the Speech or Debate Clause protects against the burden of defending charges brought in violation of its provisions as well as against conviction for such charges, his rights under the Clause will be infringed if he is forced to defend against the indictment and then appeal from a post-verdict judgment. In these circumstances defendant believes that his right to issuance of the writ is clear and indisputable.

The Government, of course, does not agree. It argues that this Court is without jurisdiction to grant the writ since defendant merely seeks reversal of a routine refusal by the district court to dismiss counts of an indictment. In addition to opposing on the merits each justification asserted by defendant in support of the petition, the Government also argues that the petition should be denied as untimely, or else denied on the ground that defendant waived his Speech or Debate privilege by voluntarily testifying before the grand jury about his legislative acts.

A.

The All Writs Act empowers the Courts of Appeals to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (1970).

The Act has been read to grant us jurisdiction to issue a writ of mandamus where the underlying proceeding is one either actually or potentially within our appellate jurisdiction. Since the prosecution of this defendant for the violation of federal bribery laws is a case potentially within our appellate jurisdiction, we have the jurisdiction to grant the writ defendant seeks. "Hence the question presented on this record is not whether [we have] power to grant the writ but whether in light of all the circumstances the case [is] an appropriate one for the exercise of that power." *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 25-26 (1943).

The Supreme Court recently has emphasized that, in determining when it is "appropriate" to issue the writ we must keep in mind that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976).

Generally, federal courts have used the writ "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26 (1943), *quoted in Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976). And while the Supreme Court in *Kerr* noted that it had "not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,' " the Court stressed that the writ should issue

only in extraordinary situations: "the fact still remains that 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.' " *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976), *quoting Will* v. *United States*, 389 U.S. 90, 95 (1967).

In order to further the congressional determination that appellate review should come only after final judgment except in the most exceptional circumstances, the courts also have required that even where circumstances amount to a "judicial usurpation of power," the petitioner must satisfy certain other conditions for issuance of the writ. Thus, the party seeking the writ must have no other adequate means to attain the relief he seeks. And petitioner also must show that his right to issuance of the writ is clear and indisputable. *Id.* at 403.

Finally, "it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Id.*

In light of these principles we examine the grounds asserted by defendant in support of his petition in order to determine if issuance of the writ is appropriate in this case.

B.

Defendant first argues that the district court is without jurisdiction to try the defendant because the indictment charges him with legislative acts. Apparently, the defendant believes that the specific references to the introduction of private bills in the first four counts establish that this indictment is actually one charging the defendant with the performance of legislative acts and so violates the Speech or Debate privilege.

The defendant distinguishes this indictment from those at issue in *United States* v. *Brewster*, 408 U.S. 501 (1972), and *United States* v. *Johnson*, 383 U.S. 169 (1966). Defendant asserts that in those cases the indictments did not charge specific legislative acts, and so did not require proof of such acts. In this case, however, the defendant believes that mention of specific legislative acts shows that the indictment charges him with the performance of legislative acts. This indictment, defendant argues, depends upon proof that the defendant introduced into the House of Representatives the specified private bills, and so depends upon proof of acts privileged against such inquiry under the Speech or Debate Clause.

We do not believe that the indictment at issue in this prosecution is materially distinguishable from that upheld by the Supreme Court in *Brewster*. In *Brewster*, four counts charged the defendant with violating 18 U.S.C. § 201(c) by agreeing to accept money in return " 'for being influenced . . . in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity.' " *United States* v. *Brewster*, 408 U.S. 501, 525 (1972). A fifth count charged Brewster with having agreed, in violation of 18

U.S.C. § 201(g), to accept money for official acts in respect to his action, vote, and decision on " 'postage rate legislation which had been pending before him in his official capacity.' " *Id.* at 527.

Though the *Brewster* Court recognized that the indictment charged the defendant with accepting bribes in connection with legislative acts themselves protected by the Speech or Debate Clause, it allowed prosecution under the indictment. It did so because neither the § 201(c) nor the § 201(g) charge required the proof of any specified legislative acts concerning the postage rate legislation to which the counts referred. The Court held that to make a prima facie case, all the Government was required to prove was the "corrupt promise for payment, for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act" under §§ 201(c) and (g). *Id.* at 526. (emphasis in original).

> Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that [Brewster] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

Id. at 527.

We think *Brewster* compels the conclusion that the indictment in the case before us does not violate the Speech or Debate Clause. The grand jury charged the defendant with conspiracy to violate and with violation of §§ 201(c)(1) & (2): to establish a prima facie case, the government need not show any of the legislative acts for which the defendant allegedly accepted payments. As the Court said in *Brewster*:

> The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that [the defendant] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Id. at 526.

Since the allegations of the indictment charge a crime even without reference to any acts protected from inquiry under the Speech or Debate Clause, defendant has not made sufficient showing to justify issuance of the writ he seeks on Speech or Debate grounds. In so holding we express no opinion as to whether, or in what circumstances, mandamus might be appropriate to prevent trial of an indictment the sufficiency of which is dependent upon proof of materials embraced by the Speech or Debate Clause.

C.

The defendant also argues that the district court's order prohibiting the introduction by the government

of any evidence of past legislative acts was an attempt by the district court to obtain jurisdiction over an indictment otherwise invalid under the Speech or Debate Clause. Defendant charges that in so modifying the proof to be permitted at trial the district court "constructively amended" the indictment, thereby depriving the defendant of his fifth amendment right to be tried only upon the indictment of a grand jury.

Though defendant is not entirely clear on this point, we understand him to argue that such a "constructive amendment" deprived the district court of jurisdiction and justifies issuance of the extraordinary writ he seeks.

Our cases have found a "constructive amendment" of the grand jury's indictment where the trial court "permitted, in the guise of a variance . . . [modification of] the facts which the grand jury charged as an *essential element* of the substantive offense." *United States* v. *Crocker*, 568 F.2d 1049, 1060 (3rd Cir. 1977) (emphasis added). Thus, "we must test to see whether there is reasonable assurance from the face of the indictment that the grand jury found probable cause on each of the essential elements which [will] underlie the verdict of the petit jury." *United States* v. *Goldstein*, 502 F.2d 526, 529 (3d Cir. 1974) (in banc).

The district court's evidential ruling in this case does not modify the proof of any essential elements of the crime with which the defendant is charged. *Brewster* makes it clear that proof of legislative acts

is not essential to a charge of official bribery under § 201(c). A prima facie case may be established under that statute without any showing of legislative acts on the part of the defendant. Accordingly, the district court's evidential limitation did not modify the proof of an essential element of the offense from that found by the grand jury.

In these circumstances, we do not believe that the district court's order constituted a "constructive amendment" of the indictment. The proofs supporting the essential elements of the crime charged have not been modified from those considered and found sufficient to support a finding of probable cause by the grand jury. The basic theory of the offense and the facts considered by the grand jury in charging that offense remain unaltered.

We thus do not believe defendant's "constructive amendment" argument entitles him to the writ of mandamus he seeks. In so holding we express no opinion as to whether or in what circumstances the "constructive amendment" of an indictment might justify issuance of such a writ.

D.

Defendant's final argument in support of his petition is that the district court is without jurisdiction to try the indictment because the grand jury that returned it heard evidence in violation of the Speech or Debate Clause. The district court rejected this argument, holding that "courts simply will not go

behind the face of an indictment, once it is returned, in order to test the competency of the evidence adduced before the grand jury." *United States* v. *Helstoski*, No. 76-201 at 4 (D. N.J., Feb. 22, 1977) (unpublished opinion).

Defendant argues, however, that presentation to the grand jury of evidence of defendant's legislative acts produced an indictment beyond the grand jury's power to return, and beyond the court's jurisdiction to try. Defendant apparently believes that the principle of separation of powers that supports the Speech or Debate privilege requires that the district court be prevented from even trying the defendant on this indictment.

The indictment, however, is valid on its face. It charges an offense for which defendant may be tried and convicted consistently with the principles of the Speech or Debate privilege.

Even in light of the expansive definition of "jurisdiction" that the Supreme Court has adopted in evaluating mandamus petitions, we do not believe that in these circumstances defendant's allegations concerning the grand jury make out " 'exceptional circumstances amounting to a judicial usurpation of power [so as to] justify the invocation of this extraordinary remedy.' " *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976), *quoting Will* v. *United States*, 389 U.S. 90, 95 (1967). We conclude that the district court has jurisdiction to try the indictment returned against the defendant in this

case, and accordingly refuse to grant the writ on grounds of grand jury abuse.

In *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943), the Supreme Court similarly refused a petition for a writ of mandamus. There the petitioner sought to quash an indictment on the grounds that the grand jury that returned it had no power to hear the subject matter presented to it, since the grand jury's statutory power to hear the allegations against petitioner had expired before it returned an indictment against him.

The Court noted that the case before it, unlike a situation where it was alleged that an indictment had been amended by the court, involved "no question of the jurisdiction of the district court. Its jurisdiction of the persons of the defendants, and of the subject matter charged by the indictment" was not implicated by the petition. *Id.* at 26. Moreover, the requisite number of duly qualified grand jurors had returned the bill. Accordingly, the writ was denied.

> The objection that the subject matter of the indictment was not one which the grand jury had been or could be continued to hear was at most an irregularity which, if the proper subject of a plea in abatement, did not affect the jurisdiction of the court.

Id. at 27.

Similarly, we do not believe defendant's allegations of grand jury abuse in this case question the jurisdiction of the court below. As established in *Costello* v.

United States, 350 U.S. 359 (1956), "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for a trial of the charge on the merits." *Id.* at 363 (footnote omitted). Thus, we believe that in this case, the district court possesses jurisdiction to try the valid indictment returned by a competent grand jury. In such circumstances, we cannot hold that we must exercise our extraordinary powers under the All Writs Act to prevent a judicial usurpation of power.

Nor do we believe defendant's right not to be questioned for legislative acts will be lost by trial on this indictment. As we have decided, the Speech or Debate Clause does not bar trial of the defendant on these charges. Any argument that the important policies underlying the Clause require dismissal of an indictment returned by a grand jury that heard evidence in violation of the Clause's principles does not go to the jurisdiction of the district court, but to the proper means that this court should use to effectuate the Clause. As such, we believe it is an argument better left for decision on appeal from a final judgment.

We also note that it is far from "clear and indisputable" that defendant could prevail on his arguments that presentation to the grand jury of evidence in violation of the Speech or Debate Clause requires dismissal of the indictment. The Supreme Court consistently has refused to countenance challenges to the competency of evidence presented to a grand jury, holding that a valid indictment returned by a competent grand jury is enough to call for a trial. *United States* v. *Calandra*, 414 U.S. 338, 342-45 (1974).

Moreover, in *United States* v. *Johnson*, 383 U.S. 169 (1966), the Court allowed retrial of the conspiracy count even though it was clear from the specification of a legislative act in the overt acts supporting that conspiracy count that the grand jury heard the evidence that the Supreme Court held was barred at trial by the Speech or Debate Clause. And on appeal after the retrial, the Court of Appeals rejected Johnson's argument that the indictment was invalid because of the presentation of evidence of legislative acts to grand jury. *United States* v. *Johnson*, 419 F.2d 56, 58 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970). *See United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966).

E.

Since we find that in the circumstances of this case it would not be appropriate for us to issue the extraordinary writ sought by defendant, we deny his petition. In light of this disposition, we need not reach the Government's argument that the petition should be dismissed as untimely. Nor need we address in this context the Government's argument that defendant waived his Speech or Debate privilege.

II.

The Government's Appeal

The Government has appealed to this court from that portion of the district court's order of February 23, 1977, holding that the "United States may not, during the presentation of its case-in-chief at the trial . . . introduce evidence of the performance of a past legislative act on the part of the defendant, Henry Helstoski, derived from any source and for any purpose." *United States* v. *Helstoski*, No. 76-201 (D. N.J., Feb. 23, 1977) (pretrial order).

A.

The defendant challenges our jurisdiction over the Government's appeal. The Government asserts that we have jurisdiction over its appeal under 18 U.S.C. § 3731 (1976), which reads in pertinent part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [*sic*] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

18 U.S.C. § 3731 (1976).

The defendant argues that since the district court's order did not suppress or exclude any specific items of evidence, it was not the type of order encompassed by the statute. Rather, defendant argues, the district court's ruling was a general delineation of the impact of the Speech or Debate clause on this prosecution. The defendant points to the failure of the district court to rule on any of the 23 offers of proof made by the Government as evidence that the district court simply was applying the principles of the Speech or Debate Clause and not excluding or suppressing evidence.

We note at the outset that § 3731 explicitly provides that "[t]he provisions of this section shall be liberally construed to effectuate its purposes." 18 U.S.C. § 3731 (1976). And as we recognized in *United States* v. *Beck*, 483 F.2d 203 (3d Cir. 1973), *cert. denied*, 414 U.S. 1132 (1974), the legislative history of the current version of § 3731 "states specifically, 'The phrase "suppressing or excluding evidence or requiring the return of seized property" should be read broadly.' " *Id.* at 206, *quoting S. Rep. No.* 91-1296, 91st *Cong.*, 2d *Sess.* 37 (1970).

In *Beck*, the Government appealed from a district court decision holding that a magistrate erred in not suppressing certain evidence, and remanding for further proceedings before the magistrate consistent with that holding. The defendant argued that we had no jurisdiction over the appeal under § 3731, since the district court's remand order itself did not suppress or exclude evidence.

Stressing that "[t]he practical effect of the decision . . . is to suppress the evidence," and relying on the "congressional mandate that a 'suppression order' be liberally construed," we held that § 3731 gave us jurisdiction to hear the appeal. *Id.*

> [W]e think allowing jurisdiction over this appeal is in harmony with the congressional purpose to permit appeals except where an ongoing trial would be interrupted.

Id.

In light of the congressional intent that we recognized in *Beck* that § 3731 be liberally construed, as well as in light of the statute's specific command, we believe the district court's order in this case fairly may be characterized as one "suppressing or excluding evidence." The practical effect of the district court's order is to prevent the Government from introducing evidence of defendant's past legislative acts that it otherwise almost certainly would have introduced at trial. Section 3731 was designed to allow appeals from such orders to insure that prosecutions are not unduly restricted by erroneous pretrial decisions to exclude evidence.

Our holding is consistent with the approach to § 3731 taken by other Courts of Appeals in analogous situations. For example, in *United States* v. *Flores*, 538 F.2d 939 (2d Cir. 1976), the Government appealed under § 3731 from an order of the district court construing an extradition order of a foreign government. The district court read the order as

prohibiting proof at trial of any acts or statements of the defendant's alleged co-conspirators if those acts or statements occurred prior to a certain date specified in the extradition order.

The defendant attacked the jurisdiction on appeal of the Court of Appeals. He argued that the order below "did not constitute a suppression or exclusion of evidence within the meaning of § 3731 but instead 'involved an order delineating the permissible scope of acts for which [the defendant] could be prosecuted.' " *Id.* at 943, *quoting* Brief for Appellee at 10.

The appellate court, however, held that § 3731 conferred jurisdiction to hear the appeal. The court noted that the Government sought to introduce the evidence that the district court believed to be prohibited by the extradition order to prove the existence of a conspiracy during a subsequent period.

> The district court's orders, therefore, necessarily constitute evidentiary rulings that determine the manner in which such a crime may be proven. Section 3731 expressly affords jurisdiction in such an instance.

Id. Accord, United States v. *Battisti*, 486 F.2d 961, 965-67 (6th Cir. 1973); *see United States* v. *Craig*, 528 F.2d 773, 774, *cert. denied*, 425 U.S. 973, *vacated and decided in banc without reference to this issue*, 537 F.2d 957 (7th Cir.) (in banc), *cert. denied*, 429 U.S. 999 (1976).

We have jurisdiction under 18 U.S.C. § 3731 to hear the Government's appeal.

B.

The Government argues that it should be permitted to introduce the private bills themselves and correspondence and conversations referring to defendant's legislative acts in order to prove the purpose of defendant in accepting the payments at issue.

In support of this contention, the Government argues that while the decision in *Brewster* forbids inquiry into the legislative process, it allows inquiry into the purpose for taking a bribe, even though that purpose is related to legislative acts. Since the Government seeks to introduce evidence of defendant's legislative acts solely to prove defendant's purpose in taking the bribe, and not in order to inquire into the legislative process itself, it believes *Brewster* permits the introduction of such evidence in this case.

Further, the government argues that correspondence and conversations of the defendant are not themselves legislative acts, and so are not protected by the Speech or Debate privilege. Accordingly, the Government believes it may use such correspondence and conversation to prove the defendant's purpose in accepting the bribes, notwithstanding that they contain references to past legislative acts.

We agree with the district court that the Government misconstrues the meaning of the Speech or Debate Clause as set out in *Brewster*. It is true that *Brewster* did not foreclose the showing of the purpose in taking the bribe. But the Supreme Court in *Brewster* made it clear that such purpose could be

shown without inquiry "into how [defendant] spoke, how he debated, how he voted, or anything he did in the chamber or in committee." *United States* v. *Brewster*, 408 U.S. 501, 526 (1972).

> Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

Id. at 527.

Indeed, in responding to fears expressed by the dissenters that it had gone too far in cutting back the Speech or Debate privilege, the Court emphasized that proof of legislative acts not only was not required under § 201(c), but was forbidden: "our holding in [*United States* v.] *Johnson precludes any showing* of how he acted, voted, or decided." *Id.* at 527 (emphasis added).

> The dissenting opinion stands on the fragile proposition that it "would take the Government at its word" with respect to wanting to prove what we all agree are protected acts that cannot be shown in evidence. Perhaps the Government would make a more appealing case if it could do so, but here, as in that case, evidence of acts protected by the [Speech or Debate] Clause is inadmissible.

Id. at 527-28.

In so holding, the Court in *Brewster* was relying on its earlier opinion in *United States* v. *Johnson*, 383

U.S. 169 (1966). There the Court allowed retrial of the conspiracy count at issue only upon the condition that the Government produce no evidence of any legislative acts. "With all references to [defendant's speech on the floor] eliminated, we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause." *Id.* at 185.

Like the district court, we do not read *Johnson* and *Brewster* as prohibiting proof of legislative acts only where evidence of such acts is introduced as part of an inquiry into the legislative process itself. The Court has been clear in its prohibition of "any showing" of legislative acts, *United States* v. *Brewster*, 408 U.S. 501, 527 (1972), just as the Clause itself prohibits inquiry into "any speech or debate." Legislative acts may not be shown in evidence for any purpose in this prosecution.

Nor may the Government circumvent this clear requirement by introducing correspondence and statements that, though not legislative acts themselves, contain reference to past legislative acts of the defendant. To allow a showing by such secondary evidence could render *Brewster's* absolute prohibition meaningless. The Government would be able to prove any legislative act simply by producing non-privileged evidence containing some reference to that act. To allow proof of legislative acts in such a manner would reduce drastically the effectiveness of the Speech or

Debate provision, and would discourage the dissemination to the public of information about legislative activities.

C.

Finally, the Government argues that it should be permitted to introduce evidence of the defendant's legislative acts on the ground that defendant waived his Speech or Debate privilege by testifying before the grand jury about legislative acts.

The district court found it unnecessary to decide whether the Speech or Debate privilege is waivable by an individual member. Because the court believed the Clause to be an important part of the Constitutional machinery insuring separation of powers, it assumed without deciding that defendant could waive his protection under the Clause, and then held that proper judicial deference to the legislative branch required that "a waiver may be found only where it has been clearly demonstrated that a legislator has expressly waived his Speech or Debate immunity for the precise purpose for which the Government seeks to use evidence of his legislative acts." *United States* v. *Helstoski*, No. 76-201, at 16 (D. N.J., Feb. 22, 1977) (unpublished opinion).

Though in the circumstances of this case the district court found that defendant was aware of his Speech or Debate privilege when he voluntarily testified about legislative acts before the grand jury, it held that the defendant had not expressly waived his

Speech or Debate rights in the manner the court believed required.

The Government maintains on appeal that the defendant possessed the power to waive his Speech or Debate privilege. Moreover, the Government argues that the district court erred in requiring an express waiver. Since the privilege is not related to the fairness of the criminal proceeding, the Government argues that a voluntariness standard should govern waiver. Alternatively, the Government believes the defendant waived his privilege even under the express waiver standard required by the district court.

The question of whether an individual senator or representative may waive his Speech or Debate privilege is an open one. The history of the privilege at common law is not conclusive on this point, and the American authorities conflict. *Compare Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808) *with T. Jefferson, Manual of Parliamentary Practice, reprinted in S. Doc. No. 92-1*, 92d *Cong.*, 1st *Sess.* 431, 442 (1971); *cf. Gravel* v. *United States*, 408 U.S. 606, 622 n.13 (1972); *United States* v. *Brewster*, 408 U.S. 501, 529 n.18 (1972).

Our view of the role played by the Speech or Debate Clause makes it unnecessary for us to decide this difficult and important question in this case. We agree with the district court that the Speech or Debate Clause's function as a protection for the legislative branch against encroachment by the executive

and judicial branches precludes a finding of waiver in the context of a criminal prosecution except where the member expressly forfeits his protection under the Clause for the purposes for which the Government seeks to use the evidence of his legislative acts.

The Government's attempt to analogize the Clause to other privileges where only a voluntariness standard is required misses the significance of the Clause. It is not a privilege against non-disclosure, as is the attorney-client privilege. Nor is it designed to insure the reliability of the evidence it protects, as does the rule preventing the introduction of coerced confessions. In each of those instances, voluntary waiver does not vitiate the purposes of the privilege. And a requirement of express waiver would not serve to further the policy underlying each privilege. *See In Re Grand Jury Proceedings (Appeal of Cianfrani)*, 563 F.2d 577, 584 (3rd Cir. 1977).

Nor is the Speech or Debate Clause analogous to the fourth amendment exclusionary rule. Voluntary consent to search is permissible because that lesser standard does not work against the policy aims of the rule, i.e., the deterrence of police conduct that violates the fourth amendment.

The Speech or Debate Clause is designed "to protect the integrity of the legislative process [and insure] the independence of individual legislators" by prohibiting the introduction into evidence of legislative acts. *United States* v. *Brewster*, 408 U.S. 501, 507 (1972). To empower the judicial branch to find

waiver upon any showing of less than an express relinquishment of the privilege would be in conflict with this purpose by creating the potential for judicial and executive encroachment on constitutionally protected legislative prerogatives in situations where the waiver of such prerogatives is not made expressly clear.

Out of deference, then, to a co-equal branch of government, we hold that even if an individual member may waive his Speech or Debate privilege—a question we do not decide—any waiver in the context of a criminal prosecution must be express and for the specific purpose for which the evidence of legislative acts is sought to be used against the member.

On the facts of this case we find no such waiver. The Government argues that the defendant's decision to testify and produce documents after receiving general warnings that he had the right to refuse to answer incriminating questions, and after receiving warnings that his statements were being recorded for possible use against him, constitutes the requisite express waiver. We disagree. At no time did the defendant expressly waive his right under article I, section 6, the Speech or Debate Clause, to be free from inquiry into his legislative acts in this case.

III.

CONCLUSION

The defendant's petition for a writ of mandamus will be denied.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1423

UNITED STATES OF AMERICA, APPELLANT

vs.

HELSTOSKI, HENRY

(D. C. Criminal No. 76-201-1)

On Appeal from the United States District Court for the District of New Jersey

Present: SEITZ, *Chief Judge* and STALEY and HUNTER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on October 6, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered February 28, 1977, be, and the same is hereby affirmed.

ATTEST:

/s/ Thomas F. Quinn
Clerk

April 13, 1978

Certified as a true copy and issued in lieu of a formal mandate on July 10, 1978.

TEST: THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1423

UNITED STATES OF AMERICA, APPELLANT

v.

HENRY HELSTOSKI, APPELLEE

(D.C. Crim. No. 76-201-1, D. of N.J.)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, STALEY, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Chief Judge

Dated: June 30, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1800

HENRY HELSTOSKI, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

HONORABLE H. CURTIS MEANOR,
NOMINAL RESPONDENT

(D.C. Crim. No. 76-201-1, D. of N.J.)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, STALEY, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Chief Judge

Dated: June 30, 1978

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 76-201

UNITED STATES OF AMERICA, PLAINTIFF

v.

HENRY HELSTOSKI, et al., DEFENDANTS

OPINION

Appearances:

Jonathan L. Goldstein, Esq.
United States Attorney
Attorney for Plaintiff

BY: Bruce I. Goldstein, Esq.
Robert Beller, Esq.
Peter B. Bennett, Esq.
Barry Ted Moskowitz, Esq.
Assistant United States Attorneys

Morton Stavis, Esq.
Louise A. Halper, Esq.
Paul Casteleiro, Esq.
Attorneys for Defendant Helstoski

Nicholas Gigante, Esq.
Attorney for Defendant Mazella

BY: Michael Miggiano, Esq.

MEANOR, District Judge.

Prior to the scheduled trial date of February 15, 1977 defendant Helstoski moved to dismiss Counts I, II, III and IV of the indictment.[1] Count I charges him, as a Congressman of the United States, with a conspiracy to solicit or receive bribes in return for his "being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives," in violation of 18 U.S.C. § 371. In connection with Count I, overt acts 2, 11, 13 and 16 allege the actual introduction of such bills. Counts II, III and IV charge the crime of seeking or accepting bribes in exchange for being influenced with respect to the introduction of private immigration bills, in violation of 18 U.S.C. § 201(c). Each of these substantive bribery counts contains a reference to the introduction of such bills.

The motion to strike the first four counts is based upon Article I, Section 6 of the Constitution of the United States which provides in pertinent part: "[F]or any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other place."

The defendant's position is that since the Speech or Debate Clause precludes inquiry by a grand jury into the performance of his legislative acts, and since

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[1] The scheduled trial was to be of Counts I through VI and XI and XII of a twelve count indictment. As a result of an opinion dated October 5, 1976, Counts VII through X were severed for later disposition. The counts that were to be tried on February 15 involved only Helstoski and did not contain charges against his codefendants.

the grand jury obviously made such an inquiry, the implicated counts of the indictment are vitiated. The Government contends that an indictment, valid on its face, is not subject to attack on the ground that incompetent or privileged evidence was presented to the indicting grand jury. In the alternative, the Government argues that the defendant waived his Speech or Debate rights by testifying without objection about his legislative acts before the grand jury, and during a prior trial in this court of one Albert DeFalco, who is alleged in Count I to be Helstoski's co-conspirator. This waiver, the Government contends, precludes Helstoski from attacking the validity of the indictment, and renders evidence of his legislative acts admissible at trial for the purpose of establishing his guilt.[2]

As will be seen, I can accept none of the arguments in toto. I come to the conclusion that dismissal of Counts I through IV of the indictment is not required. I also conclude that Helstoski has not waived his rights pursuant to the Speech or Debate Clause and, consequently, the Government may not introduce during its case-in-chief evidence, derived from any

[2] In addition, the Government also contends that even if it cannot use evidence of Helstoski's performance of legislative acts in its case-in-chief to prove overt acts done in furtherance of the conspiracy charged in Count I, or to corroborate the existence of the bribes charged in Counts II through IV, it may use such evidence on subsidiary questions such as intent and motive, or as part of the res gestae.

source, concerning the performance of a legislative act by Congressman Helstoski.[3]

[3] The parties were informed of these conclusions on February 1, 1977 during an in camera pretrial conference. At that time, I stated that a formal opinion would be issued after the trial jury was selected and sequestered. Such preliminary notification was essential in order that the Government could prepare and structure its case accordingly. The issuance of an opinion prior to selection of the jury would have compounded an already complex issue of jury selection. This case has received, and continues to receive, considerable publicity. Issuance of this opinion before jury selection would have engendered publicity regarding the actual introduction of the bills which the indictment charges were the result of bribes. Dissemination of such information on the eve of trial undoubtedly would have enlarged excusals for cause, since such evidence may not be used by the Government in its case-in-chief. After receiving notice of the decision, the Government made known its intention to take an interlocutory appeal pursuant to 18 U.S.C. § 3731, and asked for oral argument and an opportunity to make a more complete record. This request was granted, and the argument held on February 14. Since the issues presented are of constitutional moment, not only for this case but far beyond it, I did not wish to deprive the Government of what might have been its only opportunity to secure appellate review. This is not to intimate any view on my part that the order authorized by this opinion is subject to interlocutory review under 18 U.S.C. § 3731. That is a matter that should be addressed in the first instance to the Court of Appeals. I do note, however, that the Seventh Circuit in *United States* v. *Craig*, 528 F.2d 773 (7th Cir.), reversed on other grounds, 537 F.2d 957 (7th Cir.) (en banc), cert. denied, 45 U.S.L.W. 3416 (1976), accepted without discussion an interlocutory appeal under 18 U.S.C. § 3731 from an order highly similar to the order that will be entered as a result of this opinion.

I

Defendant Helstoski's contention that Counts I through IV of the indictment must be dismissed because the indicting grand jury heard evidence regarding his legislative acts is untenable. *United States* v. *Johnson*, 419 F.2d 56 (4th Cir. 1969). This is not because there is any question that a member of Congress may not be called to answer for his legislative acts before a grand jury, *Gravel* v. *United States*, 408 U.S. 606 (1972), but because courts simply will not go behind the face of an indictment, once it is returned, in order to test the competency of the evidence adduced before the grand jury. *United States* v. *Calandra*, 414 U.S. 338 (1974); *Lawn* v. *United States*, 355 U.S. 339 (1958); *Costello* v. *United States*, 350 U.S. 359 (1956); *Holt* v. *United States*, 218 U.S. 245 (1910); *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966) (dictum). This rule governs whether the evidence before the grand jury is attacked on the ground it is hearsay, *United State* v. *Costello*, supra, or on the ground the evidence was obtained and set before the grand jury in violation of the Constitution, *United States* v. *Calandra*, supra; *Holt* v. *United States*, supra; *United States* v. *Blue*, supra. As the Supreme Court noted in *Costello*, the absence of such a rule would occasion impermissible delays in reaching the merits of criminal cases because defendants could routinely insist on a preliminary trial of the validity of the indictment. Accordingly, the court held that "[a]n indictment returned

by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Costello* v. *United States*, supra, 350 U.S. at 363. The Supreme Court reiterated in *Calandra* that "the validity of an indictment is not affected by the character of the evidence considered [by the grand jury]." *United States* v. *Calandra*, supra, 414 U.S. at 344-45. This being the case, I find the four counts of the instant indictment to be immune from attack on the ground that the indicting grand jury heard constitutionally impermissible evidence.

II

Defendant's assertion that the first four counts of the indictment are invalid because of their express reference to Helstoski's performance of legislative acts can be answered without reference to the Government's argument of waiver.

In two recent cases the Supreme Court was confronted with application of the Speech or Debate Clause in the context of a criminal prosecution. In *United States* v. *Johnson*, 383 U.S. 169 (1966), the defendant was indicted for conspiring to defraud the United States and for violating federal conflict of interest legislation. The criminal acts of which he was accused took place while Johnson was serving as a member of the House of Representatives. The conspiracy count on which he was convicted alleged an agreement among Johnson and his codefendants

to obtain the dismissal of indictments against officers of a savings and loan association by exerting influence upon the Department of Justice. This court expressly alleged that Johnson had, in furtherance of the conspiracy, delivered a speech on the floor of the House favorable to independent savings and loan associations. See *United States* v. *Johnson*, 215 F.Supp. 300, 304 (D. Md. 1963). At trial, various witnesses, including Johnson, were questioned extensively concerning the authorship of the speech, its content, and Johnson's motives for giving it. Johnson and his codefendants were convicted. The Fourth Circuit set aside Johnson's conviction on the conspiracy count as violative of the Speech or Debate Clause. *United States* v. *Johnson*, 337 F.2d 180 (4th Cir. 1964). The Supreme Court affirmed because (1) the conspiracy conviction had been obtained through use of evidence of Johnson's legislative act in delivering the speech and the underlying motive for performing that act, and (2) the Government's conspiracy theory depended on a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith. The Court held that a prosecution under a general criminal statute dependent on inquiries into the legislative acts of a member of Congress, or his motives for performing them, of necessity contravenes the Speech or Debate Clause. 383 U.S. at 184-85. The Court carefully circumscribed its holding, however, stating that its decision did not touch a prosecution where such matters are not drawn into question, *id.*

at 185, and that the Clause does not reach "conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." *Id.* at 172. The court thus disapproved of that portion of the Circuit Court's opinion which it read as dismissing the conspiracy count in its entirety. The Court stated:

> The making of the speech . . . was only a part of the conspiracy charge. With all references to this aspect of the conspiracy eliminated, we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause.

Id. at 185. The case was then remanded to the district court for retrial.

A similar result was reached by the Supreme Court in *United States* v. *Brewster*, 408 U.S. 501 (1972), in which the Court, in light of *Johnson*, again held that the Speech or Debate Clause created no bar to the prosecution of a member of Congress as long as the Government's case does not include proof of a legislative act, or the motive for performing such an act. In *Brewster*, a former United States Senator was charged in four counts of an indictment with seeking or receiving bribes in return for being influenced in the performance of certain official acts. 18 U.S.C. § 201(c). In a fifth count, he was charged with the solicitation or receipt of an illegal gratuity in return for his past performance of a particular

legislative act. 18 U.S.C. § 201(g). Like the conspiracy count in *Johnson*, the gratuity count in *Brewster* made direct reference to a legislative act.

The Court rejected Brewster's contention that the indictment violated the Speech or Debate Clause. With respect to the bribery counts, the Court explained:

> The question is whether it is necessary to inquire into how [Brewster] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of [the bribery] statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that [Brewster] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Id. at 526. If the Government were able to make a prima facie case under the statute without adducing the constitutionally impermissible evidence, Brewster could be required to stand trial on the bribery charges. *Id.* The Court similarly upheld the validity of the illegal gratuity count:

> Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that [Brewster] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

Id. at 527.

I believe that *Johnson* and *Brewster* compel the conclusion that Counts I through IV of the instant indictment are not violative of the Speech or Debate Clause merely because they make reference to alleged legislative acts of defendant Helstoski. Inquiry into the legislative performance of Helstoski is not essential to a prima facie showing that Helstoski was a participant in the criminal conspiracy charged in Count I, or that he sought or received bribes as charged in Counts II through IV. This is sufficient to sustain the validity of these counts, notwithstanding their reference to legislative acts of Helstoski.

III

As the foregoing discussion of *Johnson* and *Brewster* shows, it is beyond dispute that prosecutorial use of evidence of the performance of legislative acts by a congressman as proof of his guilt of a federal crime conflicts squarely with the command of the Speech or Debate Clause. The Government here concedes two self-evident propositions. It agrees that Helstoski's introduction of private immigration bills constituted legislative acts. It also agrees that Helstoski's November 1976 defeat and his present status as an ex-congressman have no effect upon the assertion of his rights under the Speech or Debate

Clause. It insists, however, that Helstoski, by voluntarily testifying before the grand jury and at the trial of Albert DeFalco about his introduction of private immigration bills, has waived his rights under the Speech or Debate Clause, thus enabling the Government to introduce evidence of such acts at trial.[4] In further support of the waiver thesis, the Government points to its evidence of Helstoski's reference to his introducation of private immigration bills in correspondence with the persons who were the subject thereof, their attorneys and others. The Government also has evidence of Helstoski's recital of his past performance of these legislative acts in conversations with others. It makes no difference that the primary reliance of the Government is upon Helstoski's voluntary testimony about his past legislative acts during his appearances before the grand jury and at the DeFalco trial, rather than upon his correspondence and conversations. These are simply a recital of the contexts in which Helstoski made prior voluntary disclosure of his past performance of legislative acts outside the House and they all present different facets of the same argument—that by such prior voluntary disclosure Helstoski waived his rights pursuant to the Speech or Debate Clause.

[4] It is clear that Helstoski was aware of the Speech or Debate Clause at the time he made his first grand jury appearance. He had recently concluded litigation involving his franking privilege in which he had relied upon the Speech or Debate Clause. *Schiaffo* v. *Helstoski*, 350 F.Supp. 1076 (D.N.J. 1972), rev'd in part, aff'd in part and remanded, 492 F.2d 413 (3d Cir. 1974). In that litigation, Helstoski was represented by the same attorney who represented him throughout his grand jury appearances.

There can be no question but that Helstoski during his various grand jury appearances and in the DeFalco trial voluntarily testified in detail regarding his introduction of private immigration bills. He also supplied the Government with copies of the bills and with voluminous correspondence relating thereto. At no time until the present motion has he asserted any rights under the Speech or Debate Clause.

The Government takes the position that the Speech or Debate Clause confers upon a federal legislator a personal evidentiary privilege which may be waived in the same manner as other personal evidentiary privileges. Pointing to the above noted acts of the defendant, and taking pains to demonstrate the voluntariness of those acts, the Government concludes that the defendant has waived his Speech or Debate protections. The Government derives support for this position from a Seventh Circuit panel decision in *United States* v. *Craig*, 528 F.2d 773 (7th Cir.), rev'd on other grounds, 537 F.2d 957 (7th Cir.) (en banc), cert. denied, 45 U.S.L.W. 3416 (1976).

In *Craig*, a state legislator had consented to interviews with various federal officers and had testified under subpoena before a federal grand jury

investigating alleged corruption in the Illinois state legislature. Subsequently, the legislator was indicted for several federal offenses, and thereafter moved to suppress his grand jury testimony and statements he had given to Government agents on the ground that they had been obtained in violation of his federal and state Speech or Debate privileges. On appeal from the district court's order granting the motion to suppress, the majority of a three-judge panel first held that state legislators are entitled to a federal common law Speech or Debate privilege in federal criminal prosecutions, 528 F.2d at 779, and then addressed the question of whether the defendant's prior conduct constituted a waiver of that privilege.

The court perceived the Speech or Debate privilege to be analogous to privileges of confidentiality [5] which have generally been found to be waivable by voluntary conduct. In view of the fact that the defendant in *Craig* was knowledgeable in the workings of government, was represented by competent counsel, and had testified before the grand jury rather than rely on his privilege against self-incrimination of which he had been informed, the court concluded that the defendant had voluntarily waived his Speech or Debate privilege. It thus reversed the suppression order.

On rehearing en banc, the panel opinion was superseded. A majority of the court were of the opinion that no federal Speech or Debate privilege was

[5] As examples, the court cited cases which recognize the waivability of the attorney-client privilege, the marital privilege, and the physician-patient privilege. 528 F.2d at 780-81.

available to a state legislator in a federal criminal proceeding. *United States v. Craig*, 537 F.2d 957 (7th Cir.), cert. denied, 45 U.S.L.W. 3416 (1976). This conclusion, of course, rendered moot the panel discussion of the waiver issue.

While the Government has adopted the rationale of the *Craig* panel opinion in support of its waiver theory, the defendant resists this theory insisting that what the Speech or Debate Clause has created is not a personal privilege, but an institutional one. From this flows the conclusion that an individual congressman may not waive the privilege, i.e., if it is waivable at all, only the House of Representatives, as a body, can do so.

I find it unnecessary to reach the merits of defendant's position.[6] Assuming, without so holding, that

[6] Defendant's assertion that an individual congressman is without power to waive his Speech or Debate protection is not frivolous. Aside from defendant's argument that the Speech or Debate privilege is institutional and not personal, I believe the literal language of the Clause could be construed as placing a non-waivable constitutional barrier to a court's receipt of evidence of a member's legislative acts in a case in which his conduct is under scrutiny.

In support of its thesis that a federal legislator may waive his Speech or Debate privilege, the Government relies on the single instance in which the Supreme Court has mentioned the matter of waiver—a footnote in the court's opinion in *Gravel* v. *United States*, 408 U.S. 606 (1972).

In *Gravel*, the Court held that legislative aides were within the protection of the Speech or Debate Clause for their performance of acts that would be so protected if performed by the legislator himself. It then held that the legislator could waive his aide's Speech or Debate immunity. 408 U.S. at 622 n.13. From this, the Government concludes that the legislator

the Speech or Debate Clause affords certain rights which attach to a congressman, as an individual, and not to the House of Representatives, as an institution, I am unable to find that Helstoski has *waived those rights on the* facts of this case.

The central proposition underlying the position of the Government and the conclusion of the *Craig* panel is that the Speech or Debate Clause creates an evidentiary privilege akin to those generally recognized at common law and which frequently have now been codified by statute or court rule. I find this proposition to be at odds with the source and purpose of the Speech or Debate Clause, and believe that adherence to this notion renders the Clause incapable of achieving the purpose for which it was designed.

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may also waive for himself. In *Craig*, supra, the Seventh Circuit panel gave this same interpretation of *Gravel*. 528 F.2d at 780. It may be argued that this interpretation is not correct. By its literal terms, the Speech or Debate Clause applies only to legislators; it does not embrace their aides, although the court has included them within its compass in order to further the purpose of the Clause. There may thus be a constitutional difference between waiver of an aide's rights, which are afforded by judicial gloss, and waiver of a member's rights in light of the absolute language that "they [Senators and Representatives] shall not be questioned in any other place." This could be construed as placing a non-waivable constitutional barrier to receipt of evidence of a member's legislative acts in a case in which his conduct is under scrutiny. To accept this argument would be to answer in the negative a question posed and left open in both *Johnson* and *Brewster*. That question is whether the Congress constitutionally could empower the courts, through the medium of a narrowly drawn and specific statute, to receive evidence of a member's legislative acts in the course of a prosecution against him. It is not necessary to resolve that issue here.

The origin and purposes of the Speech or Debate Clause recently have been explored in depth, both by the Supreme Court [7] and commentators.[8] Its function is to insure the doctrine of separation of powers [9] by preventing executive and judicial encroachment upon legislative independence.[10] Subsidiary to this, the Clause prevents the other branches of government from distracting legislators from their duties by shielding them from the obligation to defend civil and criminal litigation calling into question their performance

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[7] *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *Doe* v. *McMillan*, 412 U.S. 306 (1973); *Gravel* v. *United States*, 408 U.S. 606 (1972); *United States* v. *Brewster*, supra; *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967); *United States* v. *Johnson*, supra.

[8] Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 Suffolk L. Rev. 1019 (1974); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 Suffolk L. Rev. 1 (1968); Reinstein & Silvergate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113 (1973); Comment, *Brewster, Gravel and Legislative Immunity*, 73 Colum. L. Rev. 125 (1973); Note, 4 Seton Hall L. Rev. 277 (1972); 11 Duq. L. Rev. 677 (1973); 27 Mercer L. Rev. 1195 (1976); 46 Miss. L. Rev. 1112 (1975); 26 Vand. L. Rev. 327 (1973); 75 Yale L. J. 335 (1965).

[9] *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881).

[10] *Eastland* v. *United States Servicemen's Fund*, supra, at 502; *Gravel* v. *United States*, supra, at 617; *United States* v. *Johnson*, supra, at 181.

of a legislative act: [11] "once it is determined that members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an *absolute* bar to interference." *Eastland* v. *United States Servicemen's Fund*, supra, at 503 (emphasis added).

In light of the history and purposes of the Speech or Debate Clause, the Government's characterization of its protection as providing nothing more than a personal evidentiary privilege is unacceptable. If that be so, then the waiver doctrines ordinarily applicable with respect to such privileges are not pertinent.

Evidentiary privileges have become part of our jurisprudence in order to give effect to the general policy consideration that the public derives greater benefit if certain classes of confidential communications remain protected from revelation, even at the cost of impeding the truth seeking process.[12] There

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[11] *Eastland* v. *United States Servicemen's Fund*, supra, at 503; *Dombrowski* v. *Eastland*, supra, at 85; *Powell* v. *McCormack*, supra, at 505.

[12] Professor Wigmore recognized four fundamental conditions to the existence of an evidentiary privilege:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8 Wigmore, Evidence, § 2285, at 527 (McNaughton rev. 1961) (emphasis in original) (footnote omitted).

can be no doubt that these privileges may be waived by voluntary conduct inconsistent with the underlying purpose of the privilege, such as the voluntary disclosure of the contents of the confidential communication to third parties.[13] The Government also seeks to analogize the Speech or Debate privilege to the Fifth Amendment's privilege against compulsory self-incrimination. This privilege exists in order to assure that admissions and confessions used against a criminal defendant are reasonably trustworthy and not the mere product of fear and coercion, and to prevent the Government from overcrowding the will of the defendant thus depriving him of the freedom to deny assisting the Government in securing his conviction.[14] Where a defendant voluntarily chooses to disclose information in the absence of coercion, the evils sought to be prevented by the privilege cannot arise. Therefore, here again a voluntary disclosure constitutes a waiver of the privilege.[15]

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[13] See, e.g., *United States* v. *Fisher*, 518 F.2d 836 (2d Cir.), cert. denied, 423 U.S. 1033 (1975) (waiver of marital privilege); *In re Horowitz*, 482 F.2d 72 (2d Cir.), cert. denied, 414 U.S. 867 (1973) (waiver of attorney-client privilege); *Bishop Clarkson Memorial Hosp.* v. *Reserve Life Ins. Co.*, 350 F.2d 1006 (8th Cir. 1965) (waiver of physician-patient privilege).

[14] *In re Gault*, 387 U.S. 1, 47 (1967).

[15] *Garner* v. *United States*, 424 U.S. 648 (1976).

The Speech or Debate Clause, however, was not designed to prevent public disclosure of a legislator's official acts. Normally those acts, like the introduction of private immigration bills at issue here, are matters of public record. It should be obvious that the Clause was not designed to insure the confidentiality of legislative acts, and, hence, the analogy to the personal evidentiary privileges is inappropriate to analysis of the Speech or Debate Clause. Furthermore, it should also be obvious that, unlike the Fifth Amendment's protection against self-incrimination, the Clause was not designed as a guarantee of the reliability of evidence of legislative acts, since those acts normally will be incontrovertible matters of public record. Thus, the analogy to the privilege against self-incrimination is also inapt.

The Supreme Court has recognized "the importance of informing the public about the business of Congress." [16] The Speech or Debate Clause would serve very little purpose if its protection were to be waived through reference by a legislator when outside the chamber to his past performance of a legislative act. To hold otherwise would be to force a legislator, in order to preserve his privilege, to refrain from reference to his legislative acts when outside the House. Obviously, such an inhibition upon dissemination of information about a member's legislative conduct is inconsistent with the political realities of our democratic system. It would be an absolute incongruity if

[16] *Doe* v. *McMillan*, 412 U.S. 306, 314 (1973).

a member when campaigning for reelection could speak of his past legislative performance only at the risk of waiving his Speech or Debate protection.

I find the conclusion inescapable that the Speech or Debate Clause does not create a mere evidentiary privilege. This conclusion is all the more compelled by the Supreme Court's holding in *Gravel* v. *United States*, supra, that while a legislator has Speech or Debate rights when his acts are called into question, he has no such rights when called to testify concerning third-party crime.[17] This being the case, doctrines surrounding the utilization and waiver of evidentiary privileges are not rationally applicable to the Speech or Debate Clause. I do not believe that a waiver of a congressman's Speech or Debate rights may be predicated on the mere showing of a voluntary disclosure of his past performance of a legislative act when outside the legislative chamber.[18]

Again, the purpose of the Speech or Debate Clause is to insulate the independent activities of the legislature from executive and judicial interference. This purpose can be achieved only if the executive is barred from utilizing evidence of legislative acts, and if the judiciary refuses to receive evidence of such acts, in

[17] *Gravel* v. *United States*, 408 U.S. 606, 628-29 (1972). The Government does not so construe *Gravel*. I agree, however, with the construction of the majority opinion given by Justice Stewart, dissenting in part. See *id.* at 630.

[18] Nor does it make any difference in what context that prior disclosure was made—whether it be before a grand jury, a petit jury in a criminal action against another, in speeches, correspondence or conversations.

a criminal prosecution of a legislator. I therefore believe that what the Speech or Debate Clause does is to erect an absolute constitutional immunity in favor of a member of Congress from having evidence of his legislative acts used in litigation against his interests. I am not certain whether a member of Congress has the power to waive this immunity.[19] But I am certain that if such power exists, it is consistent with the constitutional obligation of the judiciary to eschew interference with the legislature that the courts employ a stringent test before finding such a waiver in a given case. A waiver of the Speech or Debate immunity ought not be found by implication. Such a waiver may be found only where it has been clearly demonstrated that a legislator has expressly waived his Speech or Debate immunity for the precise purpose for which the Government seeks to use evidence of his legislative acts. A less stringent standard would vitiate the prophylactic purpose underlying the Speech or Debate Clause. It is clear that by the above standard, Helstoski has not waived his Speech or Debate immunity from having evidence of his prior legislative acts used against him in the instant criminal prosecution. Accordingly, such evidence may not be admitted at trial on the ground of waiver.

[19] See note 6, supra.

IV

After receiving in camera notice of the essentials of the ruling on the Speech or Debate issue,[20] the Government filed a motion, with supporting brief, seeking a pretrial ruling on the admissibility of 23 offers of proof set forth in its notice of motion.

It is not necessary to rule upon each of the 23 offers.[21] From what has been said in Part II of this opinion in discussing *Johnson* and *Brewster*, it is clear that the Speech or Debate Clause creates no impediment to the introduction of evidence of an agreement by Helstoski to perform *in futuro* a legislative act. What is forbidden is the introduction of evidence of his past performance of such an act.

The Government argues, however, that Helstoski's statements, both verbally and in writing, referring to the introduction of private immigration bills, do not constitute legislative acts and thus may be admitted. The argument is beside the point. The offered evidence contains reference to Helstoski's past performance of a legislative act, and the Speech or Debate Clause forbids use of such evidence during the

[20] See note 3, supra.

[21] The defendant contends that it would be improper to rule on the Government's offers of proof in advance of trial. He further objects to such a ruling on the ground that the offers of proof are couched in the form of statements by the Government. He claims that if such pretrial rulings are to be made, an evidentiary hearing is required in order to force the Government to place its offers of proof under oath.

Government's case-in-chief.[23] The same is true of the thesis that Helstoski's statements reciting the past performance of a legislative act may be used, not to corroborate the existence of a bribe, but on issues such as motive, intent, knowledge and the like.[24] This ignores the absolute command of the Speech or Debate Clause as construed and applied in *Johnson* and *Brewster*. The Clause does not say that evidence of a legislator's past performance of a legislative act may be used against him for some purpose but not others. It is, rather, that such evidence may not be used at all.[24] If the Government, for whatever reason

[23] I say case-in-chief because it is conceivable that events could occur at trial that would lead to limited use of such evidence. For examples of the use of otherwise excluded evidence on a credibility issue after the defendant "opened the door," see *Harris* v. *New York*, 401 U.S. 22 (1971) and *Walder* v. *United States*, 347 U.S. 62 (1954).

[24] The Government also says that Helstoski's statements containing a recital of his past performance of a legislative act are admissible as part of the res gestae on the ground that such statements are part of the felonious agreement. I take it that the Government means, at least in some instances, that such admissions by Helstoski are so intertwined with other statements by him that his references to the performance of legislative acts cannot be separated from the context. The above discussion is designed to dispose of this argument as well.

[24] In *Johnson*, the Supreme Court permitted the defendant to be tried on the conspiracy count only "[w]ith *all references* to [Johnson's legislative act] omitted." *United States* v. *Johnson*, supra, 383 U.S. at 185 (emphasis added). In *Brewster*, the court permitted the defendant to be tried on the bribery and illegal gratuity counts, but reiterated "our holding in Johnson precludes *any showing* of how [Brewster] acted,

cannot prove its case without reference to Helstoski's past performance of a legislative act, then the prosecution will have to be foregone.

This decision does not mean that congressmen are "super-citizens, immune from criminal responsibility." [25] They are as susceptible as any citizen to enforcement of the criminal laws, providing that the prosecution can proceed without calling into question their legislative acts. Nor does it mean that congressmen are constitutionally immune from any punishment where it is necessary to call into question their legislative acts in order to impose it.

"Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." U.S. Const., Art. 1, sec. 5, cl. 2.

Nearly a century ago, the Supreme Court said:

> [T]he Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey

voted, or decided." *United States* v. *Brewster*, supra, 408 U.S. at 527 (emphasis added). I can find no leeway in the Supreme Court's position on the inadmissibility of evidence of legislative acts in a criminal proceeding against a member of Congress to permit such evidence to be introduced in the instant case for some purposes and not for others during the Government's case-in-chief.

[25] *Brewster*, supra, 408 U.S. at 516.

some rule on that subject made by the House for the preservation of order.[26]

The Speech or Debate Clause expressly permits a member to be called into question before the House on account of his performance of a legislative act. If the House does not exercise the power conferred by the Constitution to discipline its own members, such a failure provides no basis for the executive and the judiciary to interfere, ignore the Constitution, and violate the doctrine of separation of powers.

For the reasons stated, an order will be entered denying the defendant's motion to dismiss Counts I through IV of the indictment. The order shall also provide that the Government may not, during its case-in-chief, introduce evidence, derived from any source and for any purpose, of the past performance of a legislative act by defendant Henry Helstoski.

Counsel for the Government shall present an order in conformity with this opinion, with consent to the form thereof annexed, at the earliest possible time.

DATED: February 18, 1977.

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[26] *Kilbourne* v. *Thompson*, *supra*, 103 U.S. at 189-190.

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A MOTION TO DISPENSE
WITH THE PRINTING OF
THE RECORD WAS MADE
AND GRANTED.

No. 78-349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,
Petitioner,

vs.

HENRY HELSTOSKI.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1978

UNITED STATES OF AMERICA,
Petitioner,

v.

HENRY HELSTOSKI

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The respondent, Henry Helstoski, herewith submits his opposition to the government's petition for a writ of certiorari herein.

Preliminary Statement

Heretofore, under date of September 29, 1978, respondent herein filed his petition for a writ of certiorari, No. 78-546. The said petition presented for review the action of the Court of Appeals in denying a petition for mandamus/prohibition seeking to prevent trial upon an indictment which on its face charged a Member of Congress with the performance of a legislative act. The government's petition in the instant case is from a ruling of the Court of Appeals sustaining pretrial evidentiary rulings by the District Court, which were brought up on interlocutory appeal under 18 U.S.C., §3731.

The issues in the two petitions are quite different but they are related. Accordingly, respondent respectfully suggests that the Court may wish to consider together the government's petition in the within case and the respondent's petition in No. 78-546.

Counter-Statement of the Case

The Court is respectfully referred to respondent's Statement, as it appears in his petition in No. 78-546 for his Counter-Statement of the Case. Additionally, respondent notes that the statement submitted by the government omits two vital matters which raise the most serious questions as to the appropriateness of this case for reveiw upon a writ of certiorari.

1. Much of the thrust of the government's petition is based not upon any record but rather on an assumption of what the testimony of certain witnesses might be. The defendant in this case has not only staunchly denied the allegations of the indictment; he has denied that the witnesses will testify as the government says they will. While the government has filed with the Court as part of a special appendix its proffered proofs, it failed to file with the Court an opposing affidavit which challenged the assertions of the government as to what the witnesses would say.

Accordingly, with the filing of this response to the government's petition, defendant has filed, under seal, his own special appendix, which consists of an affidavit which was filed in the District Court at the time the government filed is proffered proofs in that court. This affidavit shows that there was a sharp issue not only as to the facts but, more importantly, as to whether the government witnesses would testify as the government said they would. Thus, the supposititious nature of much of the

government's case becomes much clearer.

Not mentioned in the government's statement of the proceedings in the lower court is the fact that respondent moved to dismiss the government's appeal to the Third Circuit on the contention that the same was not covered by 18 U.S.C., §3731, a motion denied by the Third Circuit (Pet., 22a-25a). While respondent has not cross-petitioned with respect to that issue, it is nevertheless clear that by its petition the government seeks to have this Court adjudicate claimed fundamental issues with respect to the relationship between the legislative and judicial branches of our government upon a record which as to some of its basic factual underpinnings is conjectural and hypothetical.

2. The second factor omitted from the government's statement relates to its waiver argument in so far as concerns appearances before the grand jury. The government omits to mention that while material of a legislative nature was elicited from then Congressman Helstoski when he appeared before the grand jury, he had every reason at the time to believe that it was his erstwhile aide whom the government was pursuing. Since the Speech or Debate Clause does not provide any legislative immunity from testifying when third party crimes are involved (Gravel v. United States, 408 U.S. 606, 628-29 (1972)), this omission of course relates to a critical factor in evaluation of the impact, if any, of the respondent's appearances before the grand jury.

At no time during all the grand jury proceedings was respondent ever notified that he was a target. 1/

1/ As explained by Judge Meanor in his opinion of February 24, 1977 (printed at 9a of petitioner's appendix in No. 78-546), there was no question that the government was investigating the "'purchase' [of] private immigration bills from a 'connection' with the House of Representatives" (id. at 20a). But

[Footnote continued on p. 4.]

Indeed, when on May 7, 1976, he inquired whether he was, he was informed that his question was "inappropriate" (Tr., grand jury proceedings, 5/7/77, p. 13, C.A. App. 1501).[2] Respondent did not submit to the grand jury any material by way of bills or correspondence relating to bills after his request to know if he was targetted was denied an answer.

Reasons Why the Petition Should be Denied

I.

THE EFFORT TO AVOID THE HOLDINGS OF JOHNSON AND BREWSTER.

The government's petition is frankly an effort to avoid the holdings of this Court in United States v. Johnson, 383 U.S. 169 (1966), and United States v. Brewster, 408 U.S. 501 (1972). The government admits that statements in those opinions "look in the direction of the result reached by the Court of Appeals" (Pet., p. 14). It nevertheless develops an extended argument which, if it were adopted, would literally render the Speech or Debate Clause quite meaningless.

The nub of the government's argument is that, despite Brewster and Johnson, it should be permitted in a prosecution of a legislator to prove legislative acts, if -

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[Footnote 1 continued from previous page:]
the suggestion that it was Helstoski, rather than his aide, who was the "connection" was never advanced to Helstoski.

2/ "C.A. App." designates a five-volume appendix filed by the government in the Court of Appeals.

1) It proves the legislative acts by evidence of "acts and conversations ... [which] occurred outside of the congressional sphere and were not part of the due functioning of the legislative process; thus there is no question here, as there was in Johnson, of direct proof of a legislative act privileged under the Clause" (Pet., p. 15).

We understand this to mean that the government believes it can prove legislative acts provided it does so indirectly rather than directly, i.e., instead of having the Clerk of the House testify or offering the Congressional Record to establish that a Member of Congress introduced a bill or made a speech, it will seek to prove those same facts by a letter written by the Member or a campaign speech or a private conversation in which he describes his legislative activities.

2) "[T]he evidence is sought to be introduced for the legitimate purpose of proving respondent's state of mind and guilty knowledge in accepting money, and any references to the occurrence of past legislative acts are incidental" (ibid.)

We understand this argument to mean that the government may prove legislative acts to its heart's content if it but attribute to its evidence a purpose other than proof of such acts.

3) "[P]roof of the conversations and other occurrences would not 'draw into question' or 'impugn' any legislative act or 'inquire into' respondent's motives therefor" (ibid.).

We are unable to paraphrase what this argument means since frankly we do not understand it and nowhere does the government explain it. We believe the government has simply set forth its conclusion and refers to it as if it were a fact.

These contentions reveal a failure to comprehend the nature of the Speech or Debate Clause, its role in maintaining the independence of the legislature, and the tripartite structure of our government.

This view of the Speech or Debate Clause is at the heart of the Brewster and Johnson decisions, and see also, Kilbourn v. Thompson, 103 U.S. 186 (1881), and Tenney v. Brandhove, 341 U.S. 367 (1951).

1. The Speech or Debate Clause is no evidentiary loophole or legislator's perquisite. It is the bedrock upon which our system of government is built. The independence of the legislature, first established in the English Bill of Rights of 1689, was embodied into our own Constitution and became part of an even broader design of a tripartite Separation of Powers. The Speech or Debate Clause was the wall which the English Parliament and then the Framers of our own Constitution built to protect the body closest to the people's will from the executive branch. As Thomas Jefferson explained it,

> "In order to give to the will of the people the ... influence it ought to have, ... it was ... adopted as the law of this land, that their representatives, in the discharge of their function, should be free from the ... coercion of the co-ordinating branches..." 8 Works of Thomas Jefferson 322.

2. Members of Congress, however, are not left free to behave as they wish, to break the law, or to act corruptly, for Congress itself is given the authority, denied the executive and the judiciary, to scrutinize and, if need be, to punish the acts of its Members:

> "The Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment..." Kilbourn, supra, at 189-90.

Such action, however, is left to the judgment of the legislature and may not be compelled by any extrinsic power. Thus, the chance that a wrongdoer may escape justice, if justice rests only upon the judgment of his peers, was a risk the Framers consciously chose, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), as against the virtual certainty of executive depredations upon the functional independence of Congress which unrestricted prosecutorial discretion would create.

Thus, the Speech or Debate Clause functions to allocate jurisdiction. It is the Congress which has the power to prosecute for improper legislative conduct; such conduct is beyond the purview of the executive branch of the government.

3. Since ours is a government of laws, not men, the immunity created by the Speech or Debate Clause does not protect Members of Congress, as such; they are protected only to the extent they function in the legislative sphere. As this Court said:

> "The business of Congress is to legislate; Congressmen ... are absolutely immune when they are legislating. But when they act outside the 'sphere of legitimate legislative activity' [citation omitted], they enjoy no special immunity..." Doe v. McMillan, 412 U.S. 306, 324 (1973).

How, then, does the Speech or Debate Clause operate when a legislator is charged with a non-legislative act, e.g., bank fraud, and when an effort is made to introduce at the trial proof of a legislative act as some supporting evidence thereof?

Brewster and Johnson deal directly with that issue. They make clear that the Clause confers immunity upon acts, not actors. The Court in Johnson read the Speech or Debate Clause to hold that even in such a situation - when the charge was of a

non-legislative act - the government could not introduce any evidence of a legislative act. Such a holding was in accord with the historical function of legislative immunity which served to protect legislators from having their legislative acts questioned, no matter what the charge lodged against them. Johnson simply makes explicit what the Speech or Debate Clause implies: If a Member of Congress be prosecuted for non-legislative conduct, the proceeding must in the details of proof remain untainted by any incursion into "protected acts that cannot be shown in evidence," Brewster, supra, at 528.

Brewster reiterated the Johnson analysis, applying it to a charge of a corrupt agreement to procure a legislative act. Since "taking a bribe ... is not a legislative act," at 526, he could be prosecuted therefor provided that the government was "preclude[d] [from] any showing of how he acted, voted, or decided," at 527.

4. This evidentiary consequence of the Speech or Debate Clause in cases where prosecution is had for non-legislative acts is in truth the only way that the Speech or Debate Clause can have any meaning. There was a time in English history when Members of Parliament were indeed prosecuted directly for their votes and speeches in opposition to the executive. But that type of executive assault upon a legislator has long since ceased to be the method of attack upon a legislator. Even before 1689, the pursuit of a legislator has always involved charging him with a plainly non-legislative act, e.g., taking a bribe, committing treason, releasing security information. The independence of the legislative body becomes compromised, however, when legislative acts are sought to be introduced in support of such a prosecution.

Mr. Justice Harlan dealt directly with this issue in his learned opinion in Johnson when he pointed out that "[a]lthough historically seditious

libel was the most frequent instrument for intimidating legislators, this has not been the sole form of legal proceedings so employed and the language of the Constitution is framed in the broadest terms," 383 U.S. at 182-83.

5. The Framers of the English Bill of Rights, as well as of our own Constitution, thoroughly understood the evidentiary implications of the Speech or Debate Clause, for both the British and the American Clauses not only forbid prosecution for a legislative act as such but, more broadly, speak of a prohibition against "questioning" a legislator for his speech or debate. Thus, the evidentiary limitations so carefully delineated by this Court in Johnson and Brewster are the key to the implementation of the Speech or Debate Clause.

6. Nor is there any doubt as to the content of those limitations, for this Court in Johnson permitted retrial of a charge only "with all references to [defendant's legislative act - a speech on the floor] eliminated." The retrial could proceed provided it was "wholly purged of elements offensive to the Speech or Debate Clause," 383 U.S. at 185. And in Brewster, the Court, reaffirming that holding, said: "[O]ur holding in Johnson precludes any showing of how he acted, voted, or decided," 408 U.S. at 527. And again, "[p]erhaps the government would make a more appealing case if it could do so, but here, as in that case [Johnson], evidence of acts protected by the [Speech or Debate] Clause is inadmissible." 408 U.S. at 528.

7. In the teeth of the plain historical purpose of the Speech or Debate Clause and the clear holdings of this Court, the government presses for the right to prove legislative acts - provided it resorts to what it considers to be indirect rather than direct methods of proof. Thus, if it could prove that a Member of Congress performed a legislative act, e.g., introducing a bill, by introducing a letter of

his in which he said so to a constituent, then, so its argument goes, it would not be offending the Speech or Debate Clause because it would not have called the Clerk of the House to prove that fact by direct evidence nor would it have introduced the Congressional Record.

But the Speech or Debate Clause prohibits proof of legislative acts; it does not distinguish between methods of proof. Since the design and purpose of the Clause is to avoid executive and judicial threats to the independence of the legislature - to permit the legislature to do its own policing of allegations of improper conduct of legislators - plainly it could hardly matter how a legislative act is established.

8. Equally tenuous is the other argument of the government, namely, that if it designates its proof of a legislative act as being intended to establish a state of mind while engaging in a non-legislative act, it may prove the legislative act. Since, as we have pointed out, legislators are never prosecuted directly for their legislative acts but always for their non-legislative acts, the effect of this argument is to open proofs to legislative acts in any prosecution of a legislator.

9. The government also contends that it should be permitted to prove legislative acts by any private conversations or correspondence, on the theory that since those acts are not part of the legislative process itself, they ought to be established under the cases of Gravel v. United States, 408 U.S. 606 (1972), and Doe v. McMillan, 412 U.S. 306 (1973). Of course, those cases merely hold that a legislator is liable for what he does outside the halls of Congress. He could be prosecuted for publishing outside the halls of Congress government documents not publishable (Gravel); he could be sued for libel if he publishes defamatory material outside the halls of Congress (Doe). But in each case, neither the prosecution nor the proofs would involve proof of what actually

happened in the legislative body.

Here the whole point of the conversations or letters sought to be introduced is that they would establish that the legislative acts were performed. The truth of the matter is that in this case the government's case is so thin, so uncorroborated, so lacking in objective proof, and so utterly dependent on the unsupported testimony of two persons who are demonstrably untrustworthy, that it wishes to give its case the aura of plausability by massive correspondence showing that the defendant engaged in legislative activity. The trial would, on the government's scenario, become a review before a jury to what transpired on the floor of the House - exactly what the Speech or Debate Clause was designed to prevent.

The government does not dissemble; it makes it perfectly clear that it wishes a ruling that, despite Brewster and Johnson, it may in any prosecution of a Member of Congress or a Senator prove legislative acts, provided it does so a) by some indirect means, and b) it states the object of its proof as being to establish purpose or intent. We ask one simple question: What would the government's argument leave of the Clause once described by Mr. Justice Story as being that "great and vital privilege without which all other privileges would be comparatively unimportant or ineffective," I Story On the Constitution, §866, p. 600? Mr. Justice Harlan in his opinion in Johnson dealt with similar contentions of the government which were designed to limit the Speech or Debate Clause in such manner as to render it all but meaningless. But this Court, being of the view that "the legislative privilege will be read broadly to effectuate its purposes," Johnson, 383 U.S. at 180, rejected that effort. The evidentiary proscriptions delineated by Johnson and Brewster were designed to strike a reasonable balance between the Speech or Debate Clause and the proper functioning of our criminal justice system. The effort of the government in this case to undercut such

proscriptions should be dismissed out of hand.

II.

THE WAIVER ISSUE.

As we pointed out above, in the Statement of the Case, the government has omitted any reference to the fact most critical to a consideration of the waiver issue as applied to grand jury testimony, namely, that the defendant had every reason to believe that he was not the target and that, accordingly, he was required to testify. It seems quite clear that the Speech or Debate Clause does not permit a legislator to refuse to testify about legislative acts when a third party crime is investigated. 3/ Thus, there is no foundation whatever for the government's statement that Helstoski furnished documents "with knowledge that he could withhold them and assert his privilege under the Speech or Debate Clause," (Pet., p. 21). And the reference is merely to a portion of the opinion which makes clear that Helstoski knew of the existence of the Speech or Debate Clause. The government ignores the statement in that same opinion that there is no Speech or Debate immunity where third party crimes are being investigated (Pet., 57a).

To argue from those facts that there was a waiver of a great constitutional principle seems absurd. Since there is no point at which Helstoski

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3/ See Gravel v. United States, 408 U.S. 606, 628-29 (1972), and opinion of Mr. Justice Stewart, dissenting in part, id. at 630. This view of the operation of the Speech or Debate Clause in circumstances where a third party crime is being investigated was pressed on this Court by the government. See brief for the United States in Gravel v. United States, U.S. Supreme Court, Nos. 71-017 and 71-1026, p. 13.

was told he was a target of investigation, there is obviously no point at which he could be said to have waived, either expressly or voluntarily, those rights which a targetted Member of Congress has.

The truth is that it seems very doubtful that the Speech or Debate Clause is under any circumstances waivable by an individual member of the legislature. Thus, in his Manual of Parliamentary Practice, prepared only four years after the adoption of the Constitution and adopted by the House in 1937, Jefferson said:

> "The privilege of a Member is the privilege of the House. If the Member waive it without leave, it is a ground for punishing him, but cannot in effect waive the privilege of the House." Manual, §301, p. 130.

In any event, this is hardly an appropriate case to consider the issue of waiver for several distinct reasons:

a) Neither the District Court nor the Court of Appeals ruled on the underlying question, i.e., whether the Speech or Debate Clause is waivable by an individual Member. The suggestion of waivability is based exclusively on a holding by a panel of the Seventh Circuit in United States v. Craig, 528 F. 2d 773 (1976), which decision was vacated by the Circuit Court sitting en banc, 537 F. 2d 957. Even the panel decision dealt with a State, not the Federal, Speech or Debate Clause. Since neither the District Court nor the Court of Appeals in this case passed on the question, any consideration of that issue would be without the benefit of prior judicial consideration.

b) Beyond that, the issue of waiver seems to boil down to the government's pressing for a rule of waiver by voluntary act. The Third Circuit, however, quite properly views the Speech or Debate Clause not as a privilege of non-disclosure of confidentiality (Pet., 31a), but rather a part of the basic structure

of government designed "to protect the integrity of the legislative process [and insure] the independence of individual legislators," Brewster, 408 U.S. at 507. Under those circumstances, it came to the conclusion that:

> "Out of deference, then, to a co-equal branch of government, we hold that even if an individual member may waive his Speech or Debate privilege - a question we do not decide - any waiver in the context of a criminal prosecution must be express and for the specific purpose for which the evidence of legislative acts is sought to be used against the member." (Pet., 32a.)

The utter inappropriateness of the government's waiver argument is revealed by a logical extension of its position argued below but not mentioned to this Court. In the lower court, the government argued that waiver was effected not only by testimony before the grand jury but also by disclosure to constituents by correspondence and oral statements that he had performed legislative acts. If the test is indeed mere voluntariness of disclosure, such an extension of the argument is reasonable.

But, as the court below observed, a legislative body in our society is a very public institution which has as one of its important functions informing the public about its activities. Legislators do not keep their legislative activities confidential; they speak about them as much as they can, and indeed they should. This point was emphasized by the District Court in rejecting the government's argument(Pet., 56a). Yet if the grand jury testimony is taken as constituting a waiver because the testimony was voluntarily given, there is no basis for denying that a waiver may follow from other voluntary statements.

It is difficult to see that the argument that waiver of the Speech or Debate Clause occurs by

by voluntary disclosure of legislative acts presents a serious issue.

CONCLUSION

Ultimately, the government's argument is that the Speech or Debate Clause is a mere evidentiary loophole - a legislator's stratagem - an obstructive vestige of ancient times, to be interpreted into nothingness. This Court has time and time again rejected that view and has insisted upon the centrality of the Speech or Debate Clause in the workings of our tripartite system of government.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Helstoski

October 1978.

FOR ARGUMENT

Nos. 78-349 and 78-546

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY HELSTOSKI

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v.

HON. H. CURTIS MEANOR,
UNITED STATES DISTRICT JUDGE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (78-349 Pet. App. 1a-33a) is reported at 576 F.2d 511. The

opinions of the district court (78-349 Pet. App. 38a-62a; 78-546 Pet. App. 9a-22a) are not reported.

JURISDICTION

The judgment of the court of appeals (78-349 Pet. App. 34a-35a) was entered on April 13, 1978. Petitions for rehearing were denied on June 30, 1978 (78-349 Pet. App. 36a; 78-546 Pet. App. 8a). On July 25, 1978, Mr. Justice Brennan extended the government's time within which to file a petition for a writ of certiorari to and including August 29, 1978. The petition in No. 78-349 was filed on that date. On September 29, 1978, Mr. Justice Brennan extended Helstoski's time within which to file a petition for a writ of certiorari to and including October 3, 1978. The petition in No. 78-546 was filed on September 29, 1978. The petitions were granted and the cases consolidated on December 11, 1978. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause bars the government from introducing, in the bribery trial of a former Congressman, any evidence that refers to the defendant's past performance of a legislative act (No. 78-349).

2. Whether an indictment charging a member of Congress with bribery, in violation of 18 U.S.C. 201 (c), is invalid because it refers to specific legislative acts that are themselves immune from prosecution under the Speech or Debate Clause (No. 78-546).

3. Whether an indictment charging a member of Congress with bribery, in violation of 18 U.S.C. 201 (c), is invalid because the grand jury that returned the indictment considered evidence of legislative acts that may have been privileged under the Speech or Debate Clause (No. 78-546).

4. Whether the district court's restriction of the government's proof at trial to prevent references to past legislative acts is a constructive amendment of the indictment (No. 78-546).

5. Whether a Congressman's voluntary testimony and production of documents before a grand jury waives the Speech or Debate Clause privilege with respect to subsequent use of the testimony and documents by the grand jury and at trial, at least where it is clear that the Congressman knew of, but deliberately chose not to invoke, the privilege (No. 78-349).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6 of the Constitution provides in pertinent part:

> [F]or any Speech or Debate in either House, they [*i.e.*, Senators and Representatives] shall not be questioned in any other Place.

18 U.S.C. 201 provides in pertinent part:

> (a) For the purpose of this section: "public official" means Member of Congress * * *
>
> * * * * *
>
> "official act" means any decision or action on any * * * matter * * * which may by law be

brought before any public official, in his official capacity, or in his place of trust or profit.

* * * * *

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act * * * [shall be guilty of an offense].

* * * * *

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him * * * [shall be guilty of an offense].

STATEMENT

Respondent is a former member of the House of Representatives.[1] He represented New Jersey's Ninth

[1] For convenience sake, we refer to former Rep. Helstoski as "respondent," even though he is the petitioner in No. 78-546.

By agreement between the parties, respondent filed an opening brief addressing the questions presented in both petitions. The present brief in turn states the position of the United States as petitioner in No. 78-349 and respondent in No. 78-546.

Congressional District from 1965 to 1976. In June 1976, respondent was indicted in the United States District Court for the District of New Jersey on several charges arising out of grand jury investigations into alleged corruption in connection with private immigration legislation. Respondent was charged with three counts of soliciting and receiving bribes in return for being influenced in the performance of official acts, in violation of 18 U.S.C. 201(c)(1), and one count of conspiracy to commit that offense, in violation of 18 U.S.C. 371 (78-546 Pet. App. 1a-6a).[2] These four counts alleged that respondent took bribes in excess of $7,000 in exchange for introducing private immigration bills on behalf of some of his constituents.

A. The Pre-Indictment Proceedings.

During the grand jury investigations, respondent appeared before eight different grand juries on ten separate occasions from April 1974 until May 1976 (78-349 Pet. App. 5a). Respondent voluntarily tes-

[2] Respondent was also indicted on four counts of knowingly making false declarations to a grand jury, in violation of 18 U.S.C. 1623(a), one count of obstructing justice by attempting to influence a grand jury witness to testify falsely, in violation of 18 U.S.C. 1503, and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371. Respondent was the only defendant named in the perjury counts; the conspiracy and obstruction of justice counts named three members of respondent's congressional staff as co-defendants. The latter counts, as well as two perjury counts against one of respondent's co-defendants, were severed by the district court for later disposition (78-349 Pet. App. 39a n.1).

tified before those grand juries about his introduction of private immigration bills. He described in detail his motives for introducing the bills, the procedures by which he presented the bills in the House of Representatives, and the procedures used by his office to deal with private bill requests. He also testified regarding his own purported investigations of charges of fraud and bribery touching the private immigration bills (*ibid.*; C.A. App. 830-863, 944-967).[3] In addition, respondent produced for the grand jury voluminous files concerning the private bills. The files contained correspondence with Albert DeFalco, respondent's former administrative aide, and with the constituents for whom respondent introduced private bills. Copies of the bills themselves were also included. Respondent also testified and produced documents referring to the private bills when he appeared as a defense witness in DeFalco's criminal trial in October 1975 (78-349 Pet. App. 5a-6a; C.A. App. 89-215).[4]

[3] "C.A. App." refers to the five-volume appendix filed by the United States in the court of appeals.

[4] DeFalco's indictment was a product of the same series of grand jury investigations that ultimately led to the filing of criminal charges against respondent. DeFalco was respondent's administrative assistant in 1967 and 1968. After that time, he posed as a member of respondent's staff, even though he had left respondent's employ. DeFalco was convicted on three counts of violating 18 U.S.C. 912 by falsely representing himself as respondent's aide and, acting as such, demanding and receiving payments from illegal aliens who wished to have private bills granting them permanent residence in the United States introduced in Congress. He was also convicted of conspiracy to commit the substantive offense, in violation of 18 U.S.C. 371. He was sentenced to six years' imprisonment. *United States* v. *DeFalco*, Crim. No. 75-264 (D. N.J. Oct. 17, 1975), aff'd, 546 F.2d 419 (3d Cir. 1976), cert. denied, 430 U.S. 965 (1977).

Before his first grand jury appearance in April 1974, and on each subsequent appearance, the government advised respondent that he could refuse to answer questions if he believed that to do so might incriminate him (*id.* at 6a). The government also warned respondent that he was not under any compulsion to produce documents:

> Of course, you understand that if you wish not to present those documents you do not have to and that anything you do present may also, as I have told you about your personal testimony, may be used against you later in a court of law?

C.A. App. 697. To this respondent replied:

> I understand that. Whatever I have will be turned over to you with full cooperation of this Grand Jury and with yourself. * * * I promise full cooperation with your office, with the FBI, [and] this Grand Jury. * * * As I indicated, I come with no request for immunity and you can be assured there won't be any plea of the Fifth Amendment under any circumstances.

Id. at 697, 699. Respondent first asserted a Speech or Debate privilege at his next to last appearance before the grand jury (in May 1976), and then he did so only with respect to one question (*id.* at 1501-1502). He later invoked his privilege against self-

incrimination and refused to answer further questions or provide other documents (*id.* at 1473-1493, 1506-1517).

B. Proceedings in the District Court.

Respondent moved to dismiss the four counts of the indictment that charged him with agreeing to receive and receiving payments from specified illegal aliens in return for being influenced to introduce private immigration bills in their behalf. He argued that these counts violate the Speech or Debate Clause (C.A. App. 38-50). The district court denied respondent's motion to dismiss but held that the Speech or Debate Clause prohibits the government from proving "the performance of any legislative act by the Congressman in support of any of the first four counts of the indictment" (*id.* at 240-241). The court initially indicated that language in the indictment alleging the actual introduction of private immigration bills (see 78-546 Pet. App. 2a-6a) would have to be redacted before the indictment could be read or submitted to the jury at trial (C.A. App. 242-243), but in its written opinion issued two and a half weeks after its oral ruling, the court abandoned the redaction requirement and held that the first four counts of the indictment are valid, "notwithstanding their reference to legislative acts of [respondent]" (78-349 Pet. App. 47a).

The government filed a motion *in limine* seeking specific rulings on whether certain proffered evidence, including the expected oral testimony of certain witnesses and the contents of respondent's legislative files produced for the grand juries, would be admissible at

trial. The government argued that respondent waived his Speech or Debate Clause privilege by his extensive prior disclosures before the grand juries and by his express disclaimer of immunity. The government further contended that its evidence could be admitted without infringing the Speech or Debate Clause because the evidence was offered only to prove respondent's knowledge and purpose in agreeing to accept the bribes.[5]

The district court found that respondent's disclosures before the grand jury were voluntary and that he was aware of the availability of the Speech or Debate Clause privilege when he testified and produced the documents (78-349 Pet. App. 48a n.4, 49a). The court nevertheless concluded that respondent did not waive his privilege, because "[s]uch a waiver may be found only where it has been clearly demonstrated that a legislator has expressly waived his Speech or Debate immunity for the precise purpose for which the Government seeks to use evidence of his legislative acts" (*id.* at 58a).

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[5] The evidence proffered by the government included a narrative offer of proof setting forth the expected testimony of various witnesses in support of each allegation of bribery and conspiracy. The evidence also included more than 200 documents obtained from the files produced by respondent. The district court and the court of appeals ordered these materials placed under seal to protect respondent's right to a fair trial. The government's offer of testimonial proof and representative examples of the documentary evidence obtained from respondent's files have been reprinted in a special appendix filed under seal in this Court with the petition in No. 78-349.

The district court did not rule on each item of evidence proffered by the government. Instead the court simply repeated and elaborated on the evidentiary restriction it had previously imposed in its oral decision. The court stated that "prosecutorial use of evidence of the performance of legislative acts by a congressman as proof of his guilt of a federal crime conflicts squarely with the command of the Speech or Debate Clause" (78-349 Pet. App. 47a). Accordingly, the court concluded (*id.* at 62a), "the Government may not, during its case-in-chief, introduce evidence, derived from any source and for any purpose, of the past performance of a legislative act by [respondent]."

C. The Decision of the Court of Appeals.

The government appealed the district court's evidentiary ruling, and in June 1977, approximately three months after the government's notice of appeal was filed, respondent petitioned the court of appeals for a writ of mandamus directing the district court to dismiss the first four counts of the indictment.

The court of appeals refused to grant the extraordinary relief sought by respondent (78-349 Pet. App. 9a-21a). Citing *Kerr* v. *United States District Court*, 426 U.S. 394, 402-403 (1976), the court indicated that mandamus is a drastic remedy to be invoked only in exceptional circumstances where the right to relief is clear and other adequate remedies are unavailable. The court held that, under *United States* v. *Brewster*, 408 U.S. 501 (1972), the indictment in this case does

not violate the Speech or Debate Clause, even though it does list certain legislative acts performed by respondent (78-349 Pet. App. 13a-15a). The court further ruled that the evidentiary restrictions imposed by the district court did not constructively amend the indictment to charge a different offense, because "[t]he proofs supporting the essential elements of the crime charged have not been modified from those considered and found sufficient to support a finding of probable cause by the grand jury" (*id.* at 17a). Finally, the court of appeals refused to issue a writ of mandamus on the basis of respondent's contention that the district court lacks jurisdiction to try the first four counts of the indictment because the grand jury that returned the indictment considered materials protected by the Speech or Debate privilege. The court stated that respondent's argument concerning the evidence reviewed by the grand jury "does not go to the jurisdiction of the district court, but to the proper means that this court should use to effectuate the [Speech or Debate] Clause" (*id.* at 20a). Because respondent did not raise a valid jurisdictional objection, the court of appeals decided that his argument did not warrant an exercise of the extraordinary mandamus power, but was "better left for decision on appeal from a final judgment" (*ibid.*). On the merits, the court cited *United States* v. *Calandra*, 414 U.S. 338 (1974), and *United States* v. *Blue*, 384 U.S. 251 (1966), and declared that "it is far from 'clear and indisputable' that * * * presentation to the grand jury of evidence in violation of the Speech or Debate

Clause requires dismissal of the indictment" (*id.* at 20a-21a).

Turning to the government's appeal, the court affirmed the district court's evidentiary ruling. In describing the scope of the Speech or Debate privilege, however, the court of appeals used language that appears to require the exclusion of much evidence that may have been admissible under the district court's opinion. The court of appeals concluded that the Speech or Debate Clause prohibits the government from introducing any evidence that even *refers* to a past legislative act. The court stated (78-349 Pet. App. 28a-29a):

> The [Supreme] Court has been clear in its prohibition of "any showing" of legislative acts * * *. Legislative acts may not be shown in evidence for any purpose in this prosecution.
>
> Nor may the Government circumvent this clear requirement by introducing correspondence and statements that, though not legislative acts themselves, contain reference to past legislative acts of the defendant. To allow a showing by such secondary evidence could render *Brewster's* absolute prohibition meaningless. The Government would be able to prove any legislative act simply by producing non-privileged evidence containing some reference to that act. To allow proof of legislative acts in such a manner would reduce drastically the effectiveness of the Speech or Debate provision, and would discourage the dissemination to the public of information about legislative activities.

The court of appeals also refused to find a valid waiver of the Speech or Debate privilege in this case. The court acknowledged that respondent testified and produced documents before the grand jury voluntarily and with full awareness of his right to assert the privilege (78-349 Pet. App. 29a). Nonetheless, the court found no waiver. Without deciding whether the privilege can ever be waived, the court held that "the Speech or Debate Clause's function as a protection for the legislative branch against encroachment by the executive and judicial branches precludes a finding of waiver in the context of a criminal prosecution except where the member expressly forfeits his protection under the Clause for the purposes for which the Government seeks to use the evidence of his legislative acts" (*id.* at 30a-31a).

D. Further Proceedings.

Following the decision of the court of appeals, a pretrial conference was held in the district court on August 3, 1978. At this conference the district court declined the government's request to rule in advance of trial on the admissibility, under the court of appeals' decision, of specific items of proffered evidence. The court stated that it would exclude any item of evidence that contained any reference to or would afford any basis for inferring the performance of a past legislative act; the court also indicated that it would exclude evidence of payments of money to respondent subsequent to any legislative act, on the theory that the jury might infer from proof of such

payments that respondent had fulfilled his part of the illegal bargain by performing legislative acts.[6]

INTRODUCTION AND SUMMARY OF ARGUMENT

I.

The Speech or Debate Clause was intended to protect the integrity and independence of Congress and to ensure that the work of legislating can proceed without interference from the Executive or the Judicial Branch. The Clause provides that, "for any Speech or Debate in either House," Members of Congress "shall not be questioned in any other Place."

To effectuate the purpose of the Clause, the phrase "Speech or Debate" has been construed broadly to include not only actual speeches or debates, but also any "act generally done in Congress in relation to the business before it." *United States* v. *Brewster*, 408 U.S. 501, 512 (1972). At the same time, however, the Court has stressed that the Clause does not cover "all conduct *relating* to the legislative process"; protection is provided only for those acts that are "clearly a part of the legislative process—the *due* functioning of the process." *Id.* at 515-516.

By its terms the Speech or Debate Clause forbids certain "questioning" of Senators and Representatives; for their "Speech or Debate" in Congress, they

[6] In the special appendix filed with the petition in No. 78-349, italics have been used to designate those portions of the government's offer of proof that we believe would definitely or probably be excluded at trial on the basis of the court of appeals' decision as construed by the district court.

may not be questioned outside Congress. The language of the Clause thus clearly provides a witness's privilege, analogous in some ways to the Fifth Amendment privilege against self-incrimination. Senators and Representatives may not be called upon outside Congress, and in particular may not be called upon in court, to answer questions about their "Speech or Debate" in Congress.

History shows that the Framers also intended the Clause to confer an immunity from the imposition of criminal or civil liability on account of a Member's "Speech or Debate." The English antecedents of the Clause were the product of a lengthy struggle between Parliament and the Crown during which many members of the House of Commons were imprisoned for their legislative acts. Adoption of the Speech or Debate Clause by the Constitutional Convention reflected a judgment that Members of Congress should be free to perform their legislative duties without fear of criminal punishment or civil liability based on their congressional conduct.

As a corollary to the immunity provided by the Clause, courts have recognized an evidentiary privilege of uncertain scope. Unlike most evidentiary privileges, such as those covering communications between an attorney and his client or a physician and his patient, the legislative privilege is not a privilege of confidentiality. Most legislative acts are public. The evidentiary privilege enjoyed by Members of Congress is not intended to keep such acts secret; rather, it is simply a means of implementing the

Speech or Debate Clause immunity by preventing judicial inquiry into legislative acts. The exclusion of probative evidence relating to legislative acts is justified insofar as it is demonstrated to be necessary to avoid a substantial danger that criminal or civil liability will be imposed on the basis of conduct protected by the Clause.

The principal question in this case concerns the proper application of this evidentiary privilege in the bribery prosecution of a former Congressman. The limits of the privilege should accord with its role as an aid to the immunity provided by the Speech or Debate Clause; they should not be enlarged unnecessarily, lest the sound administration of justice be subverted without meaningful service to the goal of legislative independence. As this Court stated in *United States* v. *Brewster*, *supra*, 408 U.S. 517, "the shield does not extend beyond what is necessary to preserve the integrity of the legislative process."

A. *Brewster* held that the Speech or Debate Clause does not bar prosecutions of Members of Congress for soliciting or receiving payments in return for the performance of a legislative act, in violation of 18 U.S.C. 201(g), or in return for being influenced in the performance of a legislative act, in violation of 18 U.S.C. 201(c). Exclusion of evidence such as that proffered by the government in this case would make it substantially more difficult to prove such charges against Members of Congress, but it would not further the purpose of the Speech or Debate Clause.

If permitted to testify, the government's witnesses would recount conversations occurring wholly outside Congress, conversations related to respondent's alleged efforts to obtain bribes in return for being influenced in the performance of legislative acts. Respondent does not suggest that either the conversations or his part in them can legitimately be characterized as legislative acts. The bribery scheme itself is manifestly not "part of * * * the *due* functioning of the [legislative] process." Under these circumstances, suppression of the government's evidence that respondent demanded and received illegal payments for introducing private immigration bills could not possibly contribute to the legislative independence that the Framers sought to protect.

The district court and the court of appeals nonetheless refused to admit the proffered testimony, on the ground that it would recount conversations referring to past legislative acts. This decision, predicated upon a misreading of an isolated passage in the *Brewster* opinion, represents a mechanical application of the evidentiary privilege that goes far beyond "what is necessary to preserve the integrity of the legislative process." Nothing in the history of the Speech or Debate Clause or in this Court's prior decisions requires that the Clause's ancillary evidentiary privilege be given such a wide compass.

Moreover, the evidentiary restriction imposed by the courts below is logically flawed. If the vice to be avoided is the introduction of evidence that may tend to show the performance of a legislative act, then it makes little sense to exclude evidence referring to past

legislative acts but at the same time to admit evidence of a legislator's agreement to perform such acts in the future. While the first kind of evidence may be slightly more probative of the actual performance of a legislative act than the second, both circumstantially indicate to the jury that the acts mentioned have occurred by the time of trial; neither directly proves their actual occurrence. A jury could infer from a legislator's statement that he planned to introduce a bill the conclusion that he in fact did so; conversely, a statement that a bill was introduced in the past could be deliberately false or mistaken.

In sum, the admissibility of critical evidence in a constitutionally permissible prosecution should not depend on so fortuitous a factor as whether the events recounted by the evidence occurred before or after the performance of a legislative act. Such a rule would impose heavy costs on the ability of the criminal justice system to prosecute and punish corruption of the legislative process, and it would do so without any measurable gain to the goal of legislative independence that informs the Speech or Debate Clause.

B. Even if the argument just advanced is wrong and the government's proffered testimony does entail inquiry into legislative acts, the evidence should nevertheless be admitted in a prosecution under 18 U.S.C. 201, because that provision is "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." *United States* v. *Johnson*, 383 U.S. 169, 185 (1966). *Johnson* was the first case in which this Court gave

detailed consideration to the Speech or Debate Clause in the context of a criminal prosecution. The Court invalidated a Congressman's conspiracy conviction because the criminal charges were based in large part on the defendant's delivery of a speech on the floor of Congress, and the proof at trial involved extensive questioning of the Congressman and others about the preparation and motivation of the speech. The Court could not be sure that Congress intended to cover such conduct with a general criminal statute prohibiting agreements to defraud the United States.

But, the Court said, the situation might be different if it were clear that Congress had decided to regulate the conduct of its Members through the use of the criminal justice system and had passed a narrowly drawn statute to accomplish that end. Section 201 is such a statute. It unquestionably applies to Members of Congress and the "official acts" that it covers clearly include action in Congress by Senators and Representatives.

Under Article I, Section 5 of the Constitution, Congress has the power to punish its own Members. If it chooses to enlist the aid of the executive and the courts in exercising this disciplinary power, no constitutional provision is violated. *Burton* v. *United States*, 202 U.S. 344, 365-370 (1906). The rule should not be different merely because the conduct that Congress wishes to regulate by a criminal statute is related to the legislative process.

Thus, even if we are incorrect in our lead argument and the government's proposed proof of the

offenses charged in this case would involve inquiry into respondent's legislative acts, the critical fact is that Congress as an institution has decided such inquiry is acceptable. Unless one assumes that Congress in making bribery of its Members a federal offense expected that proof of such an offense would be barred in many common situations, the conclusion must be that Congress thought the introduction of relevant and probative evidence in cases such as this would not violate the Constitution. Congress's legislatively expressed views on the proper interpretation of the Speech or Debate Clause and the Punishment Clause are entitled to respect from the coordinate branches. If Congress has concluded that legislative independence would not be impaired by prosecutions like the present one, the other branches should not reject that judgment. This is particularly so because if Congress has miscalculated, and prosecutions under Section 201 do threaten the freedom and integrity of legislative deliberations, Congress itself has the power to correct its error by amending the statute.

Deference to the congressional endorsement of bribery prosecutions, even those that may inquire into legislative acts, is also appropriate because of the advantages for Congress that reliance on the criminal justice system produces. The danger of politically motivated prosecutions and punishment is sharply decreased, and Congress can avoid time-consuming disciplinary proceedings and devote its attention to the business of making the laws. Moreover, both the

substantive and procedural standards provided by the criminal law offer Members of Congress more protection than they would enjoy if they were subjected to disciplinary action in the House or the Senate.

II.

In his cross-petition, respondent has presented several attacks on the validity of the indictment. His contentions lack merit, and the procedural posture in which they reach the Court reinforces the conclusion that he is not entitled to relief.

A. Respondent contends that the first four counts of the indictment are invalid on their face because they seek to impose liability for legislative acts, in violation of the Speech or Debate Clause. This argument is insubstantial in light of *Brewster*, which upheld charges not materially distinguishable from those in this case.

Attempting to distinguish the indictment here from the one sustained in *Brewster*, respondent argues first that the present indictment specifies that private immigration bills on behalf of particular individuals were introduced in exchange for bribes, whereas the indictment in *Brewster* referred only to the "performance of official acts in respect to [the Senator's] action, vote, and decision on postage rate legislation." In respondent's view, the mere mention of particular legislative acts in the indictment renders it invalid under the Speech or Debate Clause. But the indictment in *Brewster* plainly indicated that the defendant Senator had performed legislative acts,

and this Court found the indictment acceptable. The Court correctly indicated that, because the government need not prove any legislative acts in order to prove that a Member of Congress received a bribe, any mention of such acts in an indictment is surplusage and may be disregarded without consequence.

B. Respondent also makes the broader contention that the indictment against him is invalid because it was returned by a grand jury that had considered acts and materials protected by the Speech or Debate Clause privilege. According to this argument, the indictment would be improper even if it did not list specific legislative acts, because the Speech or Debate Clause precludes any grand jury from considering acts that are immune from prosecution under the Clause.

There are several answers to respondent's position. First, he may be wrong in assuming that a grand jury's consideration of his legislative acts is improper under the Speech or Debate Clause. A grand jury proceeding is not adversarial and as long as respondent himself was not compelled to testify, the grand jury's inquiry into his introduction of private immigration bills may not have been "questioning" him for his Speech or Debate within the meaning of the constitutional provision. Second, respondent himself provided the grand jury with much of the evidence that it received concerning his legislative acts. He cannot now object to the indictment on the ground that the grand jury received the testimony and documents that he voluntarily produced. Finally, even if the grand

jury's consideration of respondent's legislative acts was improper, it would not justify dismissal of the indictment. Under this Court's decisions, it is well settled that an indictment that charges a valid offense and that is returned by a competent and unbiased grand jury is sufficient to call for a trial, regardless of the kind of evidence that persuaded the grand jury to indict.

C. Respondent's final attack on the indictment is an outgrowth of the court of appeals' ruling concerning the evidence that may be introduced by the government to prove the bribery offenses charged in the indictment. Assuming the ruling to be correct, respondent asserts that it constructively amends the indictment in a manner forbidden by both the Speech or Debate Clause and the Fifth Amendment.

The contention is groundless. The indictment against respondent has not been altered in any way. The elements of the bribery offenses that the government must prove are the same as they were prior to the evidentiary ruling now under review. The only evidence that has been excluded is evidence that refers to respondent's legislative acts, and, although those acts are mentioned in the indictment, the government need not prove them in order to establish the offenses charged.

D. Not only are respondent's asserted distinctions between the present indictment and the one upheld in *Brewster* insignificant, but he presents them in this Court on review of the court of appeals' discretionary refusal to grant a writ of mandamus to pre-

vent trial on the indictment after the district court denied respondent's motion to dismiss. The extraordinary remedy of mandamus is not a substitute for direct appeal and ordinarily is granted only to correct clear abuses of power, in situations where other remedies are not available. Respondent's complaints about the validity of his indictment will be subject to full appellate review on appeal from a final judgment of conviction—if respondent is ever convicted in the district court. Even if an interlocutory appeal from the district court's pretrial order was available to respondent under this Court's decision in *Abney* v. *United States*, 431 U.S. 651 (1977), he did not file his request for review within the jurisdictional time limits established by Fed. R. App. P. 4(b). He should not be permitted to use a petition for a writ of mandamus in order to cure a failure to file a timely appeal.

III.

By testifying and producing documents before the grand jury that would otherwise have been privileged as legislative matter, respondent waived his Speech or Debate Clause privilege with respect to subsequent consideration of that matter by the grand jury and its introduction into evidence at trial on an indictment arising out of the grand jury's investigation.

Respondent's cooperation with the grand jury was wholly voluntary, as the district court found. He testified and produced documents only after being informed that he was not required to do so. He also stated that he would request no immunity and would

not plead the Fifth Amendment under any circumstances. The district court found that respondent was aware of his Speech or Debate Clause privilege when he first appeared before the grand jury, and respondent has not contested that finding.

Notwithstanding the undisputed finding that respondent testified voluntarily before the grand jury and did so with knowledge of his evidentiary privilege, the district court and the court of appeals ruled that he did not waive his privilege. The courts held that a valid waiver of the protections conferred by the Speech or Debate Clause can be found only where a legislator has expressly waived his immunity for the precise purpose for which the government seeks to use evidence of his legislative acts. This decision was erroneous.

Respondent's voluntary testimony and production of documents, given with full knowledge of his right not to cooperate with the grand jury's investigation, are sufficient to satisfy even the most stringent of the waiver standards heretofore used by this Court. Assuming "an intentional relinquishment or abandonment of a known right or privilege" must be shown to establish a waiver of the Speech or Debate Clause, the test was met here.

Respondent argues, however, that an individual Senator or Representative cannot waive the Speech or Debate privilege. In addition, he strongly implies that neither Congress as a whole nor a single House can waive the protection of the Clause. In effect respondent's position is that a Congressman may not

introduce evidence of his legislative acts even if he wishes to do so. The Court should not endorse this novel suggestion.

If a Member of Congress himself decides to present evidence of his legislative acts to a jury, he should not be prevented from doing so. The Congressman's free choice, made with knowledge of his privilege, guarantees that legislative independence will not be jeopardized. No prohibition on waiver can be found in the language or history of the Speech or Debate Clause, and judicial adoption of such a rule would not advance the Clause's purpose.

The reasons provided by the courts below for their insistence on an especially strict waiver standard do not support departure from the more familiar "knowing and intelligent" test. The government's argument here is not that a Member of Congress waives his evidentiary privilege whenever he discusses his legislative acts outside Congress. We contend only that a valid waiver can be found in respondent's voluntary production of evidence before the grand jury after he was informed of the nature of its investigation and advised of his rights. Nor was it a prerequisite to an effective waiver that respondent be advised that he was a target of the grand jury's investigation. His right to refuse to submit to questioning about his legislative acts was the same whether or not he faced possible indictment; *Gravel* v. *United States*, 408 U.S. 606 (1972), is not to the contrary. The strict standard fashioned by the district court and the court of appeals is thus not necessary to protect

Members of Congress from inadvertent waivers or to safeguard communications with constituents.

Finally, even if this Court should rule that respondent's voluntary testimony before the grand jury is insufficient to waive his privilege with respect to the subsequent use of that evidence at trial, it should still find a valid waiver with respect to the grand jury's consideration of respondent's legislative acts. Whether the proper term be waiver or estoppel, respondent should not now be permitted to benefit by attacking his indictment on the basis of the grand jury's examination of testimony and documents that he himself provided.

ARGUMENT

I

THE SPEECH OR DEBATE CLAUSE DOES NOT BAR THE ADMISSION OF ALL EVIDENCE THAT MAY TEND TO SHOW THE PAST PERFORMANCE OF A LEGISLATIVE ACT

In a bribery prosecution of a Member of Congress, the admissibility of evidence that incidentally refers to a past legislative act can be sustained on either of two theories. The first theory, on which we primarily rely, follows the line of reasoning employed by this Court in *United States* v. *Brewster*, 408 U.S. 501 (1972). Briefly stated, the argument is that when the proposed basis of a Congressman's criminal liability is conduct not protected by the Speech or Debate Clause, the government should be permitted to prove

the criminal charges with evidence of acts and statements that are not themselves part of the legislative process, even if one or more of them refers to a past legislative act.

In developing this argument, we begin with a review of the relevant history of the Speech or Debate Clause. There follows a detailed discussion of this Court's decisions in *United States* v. *Johnson*, 383 U.S. 169 (1966), and *United States* v. *Brewster*, *supra*, the only cases in which the Court has confronted assertions of legislative immunity in the context of a criminal prosecution. The exposition of the first theory concludes with a description of the substantial policy considerations that militate in favor of admitting the kind of evidence suppressed in this case by the district court and the court of appeals.

The second theory on which the introduction of evidence referring to past legislative acts can be justified was identified but not evaluated by the Court in *United States* v. *Johnson*, *supra*. *Johnson* suggested that a criminal prosecution of a Member of Congress, even if it entails inquiry into legislative acts or motives, may nonetheless be consistent with the Speech or Debate Clause if it is "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." 383 U.S. at 185. As the government argued in *Brewster*, the bribery provision in the federal criminal code, 18 U.S.C. 201, is just such a narrowly drawn statute, and, accordingly, a charge that a Senator or Representative violated that law

should be provable with evidence that refers to past legislative acts. Because this argument was fully treated in the government's brief in *Brewster* and the Court found no need to reach it in that case, we repeat it here only in summary form and incorporate by reference the more extensive presentation in the earlier brief.

A. When a Member of Congress is charged with a criminal offense, proof of which does not require a showing of any legislative act, probative evidence should not be excluded solely because it may refer to the past performance of a legislative act.

1. The history of the Speech or Debate Clause indicates that the Clause is not concerned with evidentiary references to past legislative acts, but rather is designed to preclude inquiry by the Executive and Judicial Branches into the substance of legislative activity.

The Speech or Debate Clause was intended to protect the integrity and independence of Congress and to reinforce the separation of powers "so deliberately established" in the American constitutional scheme. *United States* v. *Johnson*, *supra*, 383 U.S. at 178. See also *United States* v. *Brewster*, *supra*, 408 U.S. at 507, 524. The history of the Clause has been canvassed in considerable detail in the Court's opinions and in previous government briefs. See *United States* v. *Johnson*, *supra*, 383 U.S. at 178-183; *United States* v. *Brewster*, *supra*, 408 U.S. at 507-509, 513-521; Brief for the United States in *Johnson* (No. 25, 1965 Term) 19-30; Brief for the United States in *Brewster*

(No. 70-45, 1971 Term) 12-22. Only a few of the more fundamental points need be repeated here.

a. The legislative privilege developed in England as an outgrowth of the long struggle for supremacy between Parliament and the Crown. Although the first assertions of legislative immunity by Members of Parliament came in response to private attempts to enlist the aid of the lower courts in disputes concerning legislative acts,[7] the Tudor and Stuart monarchs provided the major impetus for the immunity's

[7] An early example is *Strode's Case*, in which a member of the House of Commons was prosecuted in a local court for introducing legislation regulating certain abuses in the Cornwall tin industry. Strode was convicted and imprisoned for violating a local law making it an offense to obstruct tin mining. He petitioned Parliament for relief, and Parliament passed a special bill ordering his release and declaring that any accusations or punishments based on "any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament" shall be "utterly void and of none effect." See *United States* v. *Johnson, supra,* 383 U.S. at 182 n.13. One scholar, noting Parliament's role as England's highest court, has explained the affair as nothing more than a manifestation of "the obvious principle that an inferior court cannot punish members of a superior court for their actions in that court." Neale, *The Commons' Privilege of Free Speech in Parliament,* in 2 *Historical Studies of the English Parliament* 147, 160 n.45 (E. Fryde & E. Miller ed. 1970), quoted in Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers,* 86 Harv. L. Rev. 1113, 1122-1123 n.47 (1973); see also *id.* at 1125 n.58. Years later, however, Parliament cited its act in *Strode's Case* as one of the first general assertions by the legislature of its right to be free from external interference in the performance of the lawmaking function. Although Parliament's characterization of its earlier action may have been tactically effective, it was almost certainly historically inaccurate.

development. On many occasions when the Crown objected to legislative action by one or more Members of Parliament, the English monarchs tried to "utilize[] the criminal and civil law to suppress and intimidate critical legislators." *United States* v. *Johnson, supra,* 383 U.S. at 178. The important feature of these incidents is that they involved efforts by the Crown to control and restrict legislative activity and, frequently, to impose a penalty for a legislator's conduct in his legislative role, *e.g.*, the introduction of a bill or the giving of a speech.

Examples from the 16th and 17th centuries are abundant. In 1558 Queen Elizabeth I tried to forbid discussion in Parliament on the subject of her marriage and the royal succession. Paul Wentworth led a vigorous debate on whether such restraints violated the liberties of the House of Commons, and the Queen was forced to yield. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts,* 2 Suffolk U. L. Rev. 1, 7 (1968). In 1571, the Queen restrained a member of Commons from attending sessions of Parliament because he had introduced a measure to reform the Book of Common Prayer (*ibid.*). In 1575, the Queen ordered the House of Commons to cease consideration of a bill concerning the rites and ceremonies of the church. In the midst of a speech defending the prerogatives of Parliament, Peter Wentworth was taken into custody; eventually, he was imprisoned in the Tower of London (*id.* at 8-9). He

was again imprisoned in the Tower 12 years later, when he presented to the Speaker of the House of Commons a long list of questions regarding the right of freedom of speech in Parliament (*id.* at 9). A similar punishment was ordered by the Queen in 1592 for the sponsor of a bill that provoked debate about the shortcomings of the ecclesiastical courts (*ibid.*). And, in 1621, members of the House of Commons were incarcerated for refusing to heed King James I's order to discontinue discussion of the marriage he had arranged between his young son Charles and the infant Spanish princess (*id.* at 10-11). Finally, in one of the most celebrated cases of all, Sir John Eliot and two other members were prosecuted in 1629 for speeches in Parliament that King Charles I regarded as libelous or seditious. They were imprisoned and heavily fined; years later, Parliament declared the judgments against them illegal and a breach of parliamentary privilege (*id.* at 11-12; *United States* v. *Johnson, supra,* 383 U.S. at 181).

This series of skirmishes between Crown and Parliament demonstrates that the principle of legislative immunity was initially asserted and ultimately recognized in the context of the monarchy's efforts to limit the scope and substance of legislative activity. Not surprisingly, occupants of the British throne would have preferred that Parliament forbear criticism of the reigning monarch's policies and behavior and avoid altogether certain subjects said to be the exclusive preserve of the Crown. Parliament's success-

ful rejection of the Crown's efforts to circumscribe the legitimate areas of legislative concern led to the inclusion in the English Bill of Rights of the provision from which the Speech or Debate Clause is derived.[8] Particularly because the Clause was adopted by the constitutional convention without debate or opposition (see *United States* v. *Johnson, supra,* 383 U.S. at 177), its proper interpretation and application require reference to the historical record and to the specific practices that the Clause and its English counterpart were designed to prevent. Decisions concerning the scope of the Speech or Debate immunity and the coverage of the accompanying evidentiary privilege should reflect the Clause's purpose of insulating legislative activity from outside interference, particularly interference by an unfriendly executive or a hostile judiciary.[9]

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[8] The Bill of Rights provided that "the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." See *United States* v. *Johnson, supra,* 383 U.S. at 178.

[9] One of the Framers of the Constitution stated the purpose of the Speech or Debate Clause in the following frequently-quoted language:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

2 *The Works of James Wilson* 38 (J. Andrews ed. 1896).

b. By the time the Framers of the American Constitution met in Philadelphia, parliamentary privilege had been formally established in England for nearly a century. During that period the privilege was often abused, and the men who adopted the Speech or Debate Clause in 1787 were acutely aware of the new problems that recognition of parliamentary independence had created. The Framers did not intend to perpetuate in the colonies the kinds of abuses of legislative privilege that had arisen in England, and the Speech or Debate Clause should be construed with this historical lesson in mind.

The abuses that the Framers sought to avoid were of several kinds. First, as this Court observed in *Watkins* v. *United States*, 354 U.S. 178, 188 (1957), both Houses of Parliament "claimed absolute and plenary authority over their privileges," the right to "declare what those privileges were or what new privileges were occasioned, and * * * [to] judge what conduct constituted a breach of privilege." This separation of the law of Parliament (*lex parliamenti*) from the general law of the land (*lex terrae*) precluded judicial review of the legislature's exercise of its contempt power and permitted Commons to "take cognizance of almost any offence under the *lex parliamenti*, punish it as a breach of privilege, and thus invade the field of jurisdiction that rightly belonged to the judges of the *lex terrae*." C. Wittke, *The History of English Parliamentary Privilege* 200 (1921).[10]

[10] For example, Commons successfully asserted the power to punish trespass on the estates of members, theft of goods belonging to members or their servants, and illegal arrest of members' servants. C. Wittke, *supra*, at 200; see also *id.* at 32, 45-47.

Moreover, the absolute independence asserted by Parliament permitted members of the legislature to use or sell their privilege for personal gain. Members of Commons and their servants were declared to be outside the reach of the common law courts during the time that Parliament was sitting. This led to the sale of "protections" issued under the seal of particular members, providing in effect that named persons were servants of the member and should be free from arrest, imprisonment, and civil proceedings during the term of Parliament. C. Wittke, *supra*, at 39-44, 47-48; T. Taswell-Langmead, *English Constitutional History* 580 (11th ed. T. Plucknett 1960).

Finally, because the Crown was no longer able to impose its will on Parliament by threat, intimidation, or actual punishment, British monarchs in the late 17th century and throughout the 18th century frequently sought to buy votes. As one English historian has written:

> Vulgar bribes were given—directly and indirectly—for political support. * * * In the reigns of the Tudors and the first two Stuarts, prerogative had generally been too strong to need the aid of such persuasion; but after prerogative had been rudely shaken by the overthrow of Charles I., it was sought to support the influence of the Crown by the subtle arts of corruption. Votes which were no longer to be controlled by fear, were purchased with gold.

1 T. May, *The Constitutional History of England* 252-253 (F. Holland ed. 1912) (footnote omitted). See also *id.* at 253-256; 1 W. Anson, *The Law and Custom of the Constitution* 331-342 (3d ed. 1897); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 Yale L.J. 335, 337 n.10 (1965); *United States* v. *Brewster*, *supra*, 408 U.S. at 545 (Brennan, J., dissenting). Similarly, Holdsworth reports that George III needed to bribe members of Commons in order to maintain a majority in that House in support of the King's policies in the Revolutionary War. 10 *Holdsworth's History of English Law* 104-105 (1938).

The most notorious example of the Crown's corrupt control over Parliament was that body's treatment of John Wilkes, a member of the House of Commons whose struggles with George III and the King's legislative adherents lasted for nearly 20 years and aroused sustained interest in the colonies.[11] In 1763 Wilkes gave a speech in Parliament strongly criticizing a recent peace treaty with France. For this and other indiscretions in print, he was arrested and confined in the Tower of London. The Lord Chief Justice ordered his release on the ground that his arrest violated the parliamentary privilege. Influenced by the King's ministers, the House of Commons voted to expel Wilkes from Parliament. He fled to France and in his absence was convicted of

[11] This Court considered the Wilkes case in some detail in *Powell* v. *McCormack*, 395 U.S. 486, 527-528 (1969).

seditious libel. After his return to England in 1768, Wilkes was reelected to the House of Commons several times, but his erstwhile colleagues steadfastly refused to seat him. Rehabilitation finally came in 1782, when the House passed a resolution expunging the records of Wilkes' expulsion and declaring that the earlier actions of the House were " 'subversive of the rights of the whole body of electors of this kingdom.' " *Powell* v. *McCormack*, 395 U.S. 486, 528 (1969), quoting 22 Parl. Hist. Eng. 1411 (1782).

The Framers of the Speech or Debate Clause were familiar with this history of the Crown's corrupt influences over the legislature and the abuse of parliamentary privilege for the members' personal benefit. The constitutional provision here at issue was designed to guarantee legislative independence, but not to expand legislative power or free members of Congress from public accountability for their criminal misdeeds. Indeed, one of the primary goals of the Framers was to confine legislative prerogative within acceptable bounds. James Madison wrote:

> The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.
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> * * * * *
>
> * * * But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently

> numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The Federalist No. 48, 343-344 (B. Wright ed. 1961). Thomas Jefferson expressed similar sentiments. See T. Jefferson, *Notes on the State of Virginia* 120 (W. Peden ed. 1955); *Tenney* v. *Brandhove*, 341 U.S. 367, 375 n.4 (1951). See also *United States* v. *Johnson*, *supra*, 383 U.S. at 178-179.

Proper application of the Speech or Debate Clause accordingly requires an appreciation of the abuses of parliamentary privilege and the excesses of legislative power that the Framers of the American Constitution hoped to avoid. As this Court said in *United States* v. *Brewster*, *supra*, 408 U.S. at 508 (footnote omitted):

> Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

c. The third aspect of the historical background of the Speech or Debate Clause that deserves emphasis in the present context is the role of Parliament as England's highest court. See *Kilbourn* v. *Thompson*, 103 U.S. 168, 183-184 (1881). Parliament's reservation to itself of the supreme judicial authority accounts in large measure for the English legislature's insistence that it alone can determine the proper scope of parliamentary privilege. "The very fact of the supremacy of Parliament as England's highest tribunal explains the long tradition precluding trial for official misconduct of a member in any other and lesser tribunal." *United States* v. *Brewster*, *supra*, 408 U.S. at 518. See also *id.* at 520 n.15. Parliament's judicial tradition has an important consequence in addition to the legislature's retention of the exclusive right to punish its members for official misconduct.[12] Because Parliament regards itself as the sole guardian of its privilege, the English legislature claims the authority to determine when its freedom of speech or debate has been violated and then to imprison the offender for contempt. Such action, at least in theory, is not subject to judicial

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[12] The absence of bribery prosecutions of Members of Parliament in the Crown courts is explained by the fact that no statute exists in England rendering the receipt of bribes by Members of Parliament a criminal offense.

review.[13] See Cella, *supra*, 2 Suffolk L. Rev. at 15-16; Note, *supra*, 75 Yale L.J. at 337-338.

This limitation on judicial review of assertions of legislative privilege has never been accepted in the United States. "Unlike the English practice, from the very outset the use of contempt power by the legislature was deemed subject to judicial review."

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[13] Perhaps the most concise description of the current status of Parliament's exclusive privilege jurisdiction is contained in T. May, *The Law, Privileges, Proceedings and Usage of Parliament* 200-201 (19th ed. 1976) (footnotes omitted):

> The House of Commons claims that its admitted right to adjudicate on breaches of privilege implies in theory the right to determine the existence and extent of the privileges themselves. It has never expressly abandoned its claim to treat as a breach of privilege the institution of proceedings for the purpose of bringing its privileges into discussion or decision before any court or tribunal elsewhere than in Parliament. In other words, it claims to be the absolute and exclusive judge of its own privileges, and that its judgments are not examinable by any other court or subject to appeal.
>
> On the other hand, the courts regard the privileges of Parliament as part of the law of the land, of which they are bound to take judicial notice. They consider it their duty to decide any question of privilege arising directly or indirectly in a case which falls within their jurisdiction, and to decide it according to their own interpretation of the law.
>
> The decisions of the courts are not accepted as binding by the House in matters of privilege, nor the decisions of the House by the courts. Thus the old dualism remains unresolved. In theory "there may be at any given moment two doctrines of privilege, the one held by the courts, the other by either House, the one to be found in the Law Reports, the other in Hansard; and there is no way of resolving the real point at issue should the conflict arise."

Watkins v. *United States*, 354 U.S. 178, 192 (1957); *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821). Moreover, this Court has indicated that Congress's power to punish for contempt is not as broad as Parliament's, but rather is restricted to those occasions on which the acts complained of "obstruct the performance of the duties of the legislature." *Jurney* v. *MacCracken*, 294 U.S. 125, 148 (1935); *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 189-190.

As the Court recognized in *Brewster*, 408 U.S. at 508, 518-519, the differences between parliamentary privilege and congressional privilege are relevant to the question whether courts may entertain criminal prosecutions of legislators for bribery. *Brewster*'s holding that the Speech or Debate Clause does not prohibit such prosecutions under 18 U.S.C. 201 rests in part on the conviction that Congress, unlike Parliament, "is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process." 408 U.S. at 518. See also *United States* v. *Brown*, 381 U.S. 437, 445 (1965). At least one commentator has observed that results similar to that in *Brewster* have been reached in United Kingdom countries other than England, "where provision for legislative free speech or debate exists but where the legislature may not claim a tradition as the highest court of the realm * * *." Note, *supra*, 75 Yale L.J. at 338. See *id.* at 338-339, and cases there cited. See also *United States* v. *Johnson*, *supra*, 383 U.S. at 180 n.9, citing the same group of cases.

The principal issue in the present case involves not immunity from prosecution but the scope of the evidentiary privilege conferred by the Speech or Debate Clause. The divergence of parliamentary and congressional privilege remains relevant, however. For if the Speech or Debate Clause permits American legislators, unlike their English counterparts, to be prosecuted for soliciting or receiving bribes in connection with their official duties, then the very same constitutional provision should not be construed to impose evidentiary restrictions that effectively foreclose the possibility of proving a bribery charge in the vast majority of cases, particularly where those restrictions do little to further the constitutional goal of legislative independence.

2. ***Prior decisions of this Court indicate that the Speech or Debate Clause privilege does not extend to statements made and acts occurring outside the legislative process, even where such acts or statements refer to past legislative acts or give rise to an inference that a particular legislative act has been performed.***

On two previous occasions in the last 15 years, this Court has reviewed cases involving allegations that Members of Congress received or agreed to receive bribes in return for being influenced in the performance of legislative acts. *United States* v. *Johnson*, *supra*; *United States* v. *Brewster*, *supra*. Although the evidentiary question here presented remains unresolved, the earlier decisions do provide some guidance on the scope of the Speech or Debate privilege.

Before turning to an examination of the relevant precedents, however, it may be useful to summarize briefly the kinds of evidence here at issue, so that discussion of previous cases can focus more sharply on the implications of earlier decisions for the present controversy.

a. Respondent has been accused of taking bribes in exchange for introducing private immigration bills in the United States House of Representatives.[14] Three kinds of evidence proffered by the government are now in dispute. First are the immigration bills themselves. See, *e.g.*, 78-349 Sp. App. 13. Second is correspondence between respondent and the persons for

[14] It perhaps should be explained at this juncture that the mere introduction of a private immigration bill confers a substantial benefit on the party for whom the bill is introduced. Passage of such a bill, of course, results in the lawful admission of an alien to permanent residence in the United States. See 78-349 Sp. App. 13. But the mere introduction of such proposed legislation, regardless of its fate in Congress, triggers an investigation by the Immigration Subcommittee of the Judiciary Committee of the House in which the bill is introduced. Reports on each private immigration bill are prepared by the Immigration and Naturalization Service and the State Department. As a general rule, persons who are the subject of private bills need not fear deportation or other enforcement action by the INS while the bills are pending in Congress. The process of committee consideration typically entails a period of several months, and even if a private bill is ultimately rejected, it will still have had the effect of significantly prolonging an alien's stay in the United States. Moreover, the additional time spent in this country as the result of a private bill may advance an alien's standing among applicants for permanent residence sufficiently that he will receive a permanent visa regardless of the final congressional action on his bill.

whom the bills were introduced and between respondent and his former administrative aide, DeFalco. See, *e.g.*, 78-349 Sp. App. 12, 15-25. This correspondence concerns the progress of the private immigration bills and the Immigration Subcommittee's request for supporting information to establish the hardship necessary for favorable action on the bills. Neither the bills nor the letters themselves contain any suggestion of illegal activity. They are neutral documents that simply witness respondent's efforts on behalf of some of his constituents. Respondent himself produced this documentary material in connection with his grand jury testimony.

The third and most important category of evidence that the district court and court of appeals suppressed is the testimony of various persons involved in the alleged bribery scheme, including persons for whom private immigration bills were introduced. The government's narrative offer of proof, reproduced in 78-349 Sp. App. 2-11, describes the testimonial evidence excluded by the courts below on the ground that it refers to a past legislative act or might support an inference that such an act occurred. This evidence may be divided into several subcategories: (1) testimony showing that payments were made to DeFalco or to respondent or for respondent's account, after private immigration bills were introduced; (2) statements that respondent or DeFalco demanded payment, and sometimes accompanied their demands with explicit declarations that the payment was sought in exchange for private bills already introduced; (3) testimony that respondent told beneficiaries of private bills that he had introduced bills on their behalf; (4) testimony that DeFalco told prospective beneficiaries of private bills that respondent had introduced such bills on behalf of others; and (5) testimony that, after the appearance of a newspaper article reporting that aliens had paid for private bills introduced by respondent, DeFalco visited persons for whom bills had been introduced and told them not to cooperate with the Federal Bureau of Investigation.

The courts below ruled that the introduction of any or all of this evidence would violate the Speech or Debate Clause, because the evidence would indicate to the jury that respondent performed particular legislative acts, *viz.*, that he introduced private immigration bills in the House of Representatives. In support of this result, the district court and court of appeals relied on *Johnson* and *Brewster*. Careful examination of those decisions, however, reveals that they do not adopt the expansive reading of the Speech or Debate Clause urged by respondent, but instead tie the scope of the privilege closely to "what is necessary to preserve the integrity of the legislative process." 408 U.S. at 517.

b. *United States* v. *Johnson*, *supra*, involved the indictment and conviction of a member of the House of Representatives for conspiracy to defraud the United States, in violation of 18 U.S.C. 371. The conspiracy count alleged that Representative Johnson agreed to use his influence to attempt to persuade the

Justice Department to dismiss a mail fraud indictment against a savings and loan institution and its officers. The indictment further alleged that, as part of the conspiracy, Johnson agreed to give a speech in Congress defending the stability and integrity of Maryland's independent savings and loan associations; he also agreed to help obtain 50,000 reprints of the speech for distribution to the general public and to members of the Maryland General Assembly. In return, he received substantial compensation.

At trial the government introduced into evidence one of the reprints of Johnson's speech.[15] Parts of the text had been underlined by the savings and loan company in order to encourage persons to whom the reprints were distributed to become depositors. Johnson himself introduced into evidence an official copy of the speech taken from the Congressional Record. Johnson testified in his own defense and was cross-examined at some length about the content of the speech, his reasons for giving it, and the way in which it was prepared. See 383 U.S. at 174 n.5, 176 n.7. In addition, a government witness, a public relations representative for an organization of Maryland savings and loan associations, was questioned about the preparation of the speech and his role in providing information for Johnson's administrative assistant, who was primarily responsible for drafting the text. The administrative assistant and one of Johnson's co-defendants were also cross-examined concerning the speech. See *id.* at 173 n.4.

This Court upheld the reversal of Johnson's conviction on the conspiracy count. The Court emphasized that the charge against Johnson was conspiracy to defraud the United States, not conspiracy to commit any substantive offense.[16] As a consequence, the Court ruled, proof of the government's case inevitably entailed inquiry into the decision to make the speech, the motivation for that decision, and the content and preparation of the speech. 383 U.S. at 177, 180, 184.

[15] The reprints were prepared by the Government Printing Office at the request of Representative Johnson's office. They were paid for by the savings and loan company that was named as a defendant in the mail fraud indictment.

[16] This is not to say, of course, that Johnson's conduct did not violate any of the substantive provisions of the federal criminal code and would not have justified an accusation that he conspired to commit such violations. For reasons that are not clear, Johnson was not indicted for conspiracy to commit a substantive offense. He was indicted and convicted on one count of conspiracy to defraud the United States and also on seven counts of violating the federal conflict-of-interest statute, 18 U.S.C. (1964 ed.) 281 (now 18 U.S.C. 203), by taking money in exchange for his efforts on behalf of the savings and loan company. The court of appeals held that, although there was sufficient independent evidence to support Johnson's convictions on these counts, the convictions were tainted by the introduction of evidence concerning the speech and its motivation, authorship, and accuracy. Accordingly, the court vacated the convictions and remanded for a new trial. 337 F.2d 180, 204 (4th Cir. 1964). In part because the government did not contest this aspect of the court of appeals' decision (see 383 U.S. at 185-186 & n.16), this Court upheld the reversal of the conflict-of-interest counts. On remand, Johnson was again convicted on all seven of these counts. The court of appeals affirmed, and this Court denied certiorari. 419 F.2d 56 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970).

In relevant part, the government's conspiracy theory was that Johnson had agreed to defraud the United States by delivering a paid speech in the House of Representatives. This required the government to prove not only that Johnson took money in return for the speech, but also that he intended to defraud the United States by doing so. The indictment did not charge simply that Johnson received or agreed to receive money in return for being influenced in the performance of a legislative act (see 18 U.S.C. 201(c)) or because of a legislative act performed or to be performed by him (see 18 U.S.C. 201(g)).[17]

[17] The proposed indictment in *Ex parte Wason*, L.R. 4 Q.B. 573 (1869), was similar to the one found deficient in *Johnson*. The facts of *Wason* are complicated. In February 1867 Wason gave to Earl Russell a petition addressed to the House of Lords. The petition charged that the Lord Chief Baron, in his previous position as the Queen's Counsel, made a false statement before a committee of the House of Commons sitting as a judicial tribunal. The petition asked the House of Lords to investigate this charge and, if it found the charge accurate, to commence proceedings to remove the Lord Chief Baron from his judicial post. Earl Russell kept his promise to present the petition to the Lords, but he, the Lord Chief Baron, and Lord Chelmsford allegedly conspired to prevent the petition from being granted by falsely stating to their colleagues that Wason's charge was untrue. Wason then appeared before a local police magistrate and sought to prefer an indictment against Earl Russell, the Lord Chief Baron, and Lord Chelmsford for conspiring to "prevent the course of justice, and to injure and prejudice a third party." The magistrate concluded that the facts alleged did not state an indictable offense and the Court of Queen's Bench agreed.

The court held that the prospective defendants could not be prosecuted for conspiring to deceive the House of Lords, because "statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person." 4 Q.B. at 576. The alleged offense was nothing more than an agreement to perform a legislative act, and like the act itself, an agreement to perform it or an attempt to perform it could not be the subject of a criminal charge.

By contrast to the proposed indictment in *Wason*, the indictment in the present case does not seek to treat as a crime behavior that is merely an inchoate version of a legislative act. Instead the counts here under attack charge three substantive offenses and an agreement to commit those offenses, all of which are completely independent of the actual performance of any legislative act. Thus, although the proposed indictment in *Wason* suffered from much the same defect that the Court found objectionable in *Johnson*, no such shortcoming afflicts the indictment in the controversy now before the Court.

The Court carefully limited its ruling to the particular conspiracy count at issue.[18] 383 U.S. at 184-185. The Court stressed the narrowness of its holding (*id.* at 185):

> Our decision does not touch a prosecution which, though as here founded on a criminal statute of

[18] The Court acknowledged that the remaining allegations in the conspiracy count might form the basis for a conviction on the theory that Johnson agreed to defraud the United States by contacting various Justice Department officials in an attempt to procure the dismissal of the mail fraud indictment against the savings and loan company and its officers. The Court therefore remanded for a new trial on the conspiracy count, "wholly purged of elements offensive to the Speech or Debate Clause" (383 U.S. at 185). On remand, the government did not object to Johnson's motion to dismiss the conspiracy count, and the district court granted the motion. 419 F.2d at 58.

> general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.

In addition, the Court reserved judgment on whether it would reach a similar result if a Congressman were prosecuted under "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members" (*ibid.*). Prosecution under such a statute, the Court suggested, might be permissible even if it did involve "inquiry into legislative acts or motivations" (*ibid.*).

As this review of *Johnson* demonstrates, that decision does not establish the inadmissibility of the government's proffered evidence in the present case. The Court in *Johnson* disapproved a criminal charge that could only be substantiated through detailed questioning about a particular legislative act. The Court also found impermissible the cross-examination of Representative Johnson and others about the motives for the speech and its method of preparation. The Court did not state or imply that evidence referring to the past performance of a legislative act by a Member of Congress is *ipso facto* inadmissible in a criminal trial of that Congressman.[19] On the contrary, the Court specifically said (383 U.S. at 185) that its decision

[19] Indeed, in *Johnson* itself, the Court did not criticize the admission of evidence that Johnson received payments from the savings and loan company he allegedly agreed to help. Under the view adopted by the district court in the present case, such evidence should have been excluded because it might have given rise to an inference that Johnson had previously performed a legislative act for the company.

had no bearing on a prosecution in which the legislative acts of a Congressman and his motives for performing them are not drawn into question.

This is just such a case. Proof of the bribery charges against respondent does not require evidence that respondent introduced a private immigration bill or performed any other legislative act. The government does not need to prove the contents of bills sponsored by respondent, and it does not need to examine respondent or any other witness about the reasons for respondent's conduct in Congress. Where proof of the offense charged does not necessitate proof of a legislative act and the motivation therefor, *Johnson* does not forbid the introduction of evidence that incidentally refers to a past legislative act. *Johnson* simply does not address evidentiary questions arising in connection with an indictment like that at issue here.

The concern of the Court in *Johnson*, like the concern of the Speech or Debate Clause itself, was with accusations and trials that call legislators to account for what they have done in Congress. The indictment returned against respondent contains no such charges, and introduction of the evidence offered by the government will not involve the kind of inquiry condemned in *Johnson*. At most, the evidence will indicate to the jury that respondent performed a legislative act. This will violate neither the letter nor the spirit of *Johnson*. *Johnson* found fault not with a simple showing that a Congressman gave a speech, but with the government's attempt to impose criminal

liability on the basis of that act and to question the Congressman and others about the act's background and motivation. No such attempt is involved here.

c. *United States* v. *Brewster, supra,* confirms the accuracy of this description of the ruling in *Johnson.* The indictment in *Brewster* charged a former United States Senator with four counts of receiving money in return for being influenced in the performance of a legislative act, in violation of 18 U.S.C. 201(c), and one count of receiving money for legislative acts previously performed, in violation of 18 U.S.C. 201 (g).[20] The indictment alleged that Senator Brewster received $24,500 from a representative of Spiegel, Inc., a large mail-order firm, in return for votes and other official actions in connection with postage rate legislation pending in Congress. On Brewster's motion, the district court dismissed all five counts against the former Senator on the ground that the Speech or Debate Clause, as interpreted in *Johnson,* " 'constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.' " 408

[20] The difference between the two statutory provisions is that Section 201(c) requires a showing that the money was paid for the purpose of affecting the legislator's action, whereas Section 201(g) requires only that money be paid for or because of either a past or a future legislative act. It is thus no defense to an indictment under Section 201(g) to show that a particular act was or would have been performed regardless of the payment of money. In other words, Section 201(c) prohibits bribery, narrowly defined, and Section 201(g) prohibits the receipt of gratuities for official acts. See *United States* v. *Brewster,* 506 F.2d 62, 72 (D.C. Cir. 1974).

U.S. at 504. The government appealed directly to this Court and argued the case solely on the theory that *Johnson* did not determine the validity of the indictment against Brewster, because 18 U.S.C. 201 is "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members" (383 U.S. at 185), and therefore Brewster's prosecution was one of the kind that the Court in *Johnson* had explicitly left open for future consideration.[21]

This Court reversed the dismissal of the indictment without reaching the argument presented by the government. See 408 U.S. at 529 n.18. The Court held that the Speech or Debate Clause protects Members of Congress "from inquiry into legislative acts or the motivation for actual performance of legislative acts" (*id.* at 509, 525). But, the Court said, the Clause does not immunize "all conduct *relating* to the legislative process" (*id.* at 515, emphasis in original; see also *id.* at 513-514, 515-516). The Court stated that *Johnson* should be viewed as a "unanimous holding that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts" (*id.* at 512). And, the Court observed, in a comment with special relevance for the present case, "an inquiry into the purpose of a bribe 'does not draw in question the legislative acts of

[21] The government's only discussion of the position ultimately accepted by the Court appeared in the Supplemental Memorandum for the United States on Reargument 3-8.

the defendant member of Congress or his motives for performing them'" (*id.* at 526).[22]

The Court thus regarded the indictment in *Brewster* as one belonging to a category that *Johnson* avowedly did not address. Notwithstanding the government's apparent assumption that *Johnson* required a broader reading, the Court in *Brewster* made clear that the only vice condemned in the earlier case was the government's detailed inquiry into legislative performance and the reasons therefor. Having emphasized the critical difference between the kinds of proof necessary to sustain the indictment in *Johnson*, on

[22] On remand the district court dismissed the count charging Brewster with an offense under Section 201(g). Ignoring part of this Court's decision (see 408 U.S. at 527), the district court ruled that the Section 201(g) count "related explicitly to payment for acts already performed, and thus the Government could not prove its case without proving the performance of legislative acts." *United States* v. *Brewster*, 506 F.2d 62, 65 n.4 (D.C. Cir. 1974). The case went to trial on the four counts charging Brewster with receiving bribes, in violation of Section 201(c). At the close of the government's case, the district court dismissed one of the counts for insufficient evidence. *Ibid.* The remaining three counts went to the jury, and the district court charged that the receipt of an illegal gratuity under Section 201(g) is a lesser included offense of bribery as defined in Section 201(c)(1). The jury returned a guilty verdict on three counts of receiving an illegal gratuity, in violation of Section 201(g). The court of appeals sustained the lesser included offense instruction but reversed the convictions on the ground that the district court's instructions did not adequately distinguish between criminal and innocent acceptance of funds. 506 F.2d at 78-83. In June 1975, Brewster entered a plea of *nolo contendere* to one count of accepting an illegal gratuity, in violation of Section 201(g).

the one hand, and *Brewster*, on the other, the Court responded to Mr. Justice White's criticism that the indictment in *Brewster* was defective because it charged offenses related to Brewster's action, vote, and decision on postage rate legislation. See 408 U.S. at 553-555 (White, J., dissenting).

The majority readily acknowledged the connection identified by Mr. Justice White, but it stated that this linkage did not invalidate the indictment because the government "need not prove any specific act, speech, debate, or decision to establish a violation of the statute under which [Brewster] was indicted" (408 U.S. at 527-528). In the same context, the Court also stated that "*Johnson* precludes any showing of how [Brewster] acted, voted, or decided" (*id.* at 527). On this latter sentence, respondent now places his principal reliance (Br. 33).

Respondent assigns the broadest possible meaning to the words "any showing" and contends that the Speech or Debate Clause, as construed in *Johnson* and *Brewster*, bars the introduction of any evidence that refers to a legislative act or suggests to the jury that a legislative act has been performed. The district court and court of appeals accepted this argument and excluded critical portions of the testimony and documentary evidence offered by the government (78-349 Pet. App. 26a-29a, 59a-62a). But respondent's position and the decisions below reflect a serious misunderstanding of *Brewster* and a willingness to isolate a single sentence from the majority opinion in that case and read it in such a way as to ob-

viate the remainder of the Court's thorough discussion.

In light of the Court's holding in *Brewster*, the words "any showing" cannot possibly mean "any evidence that refers to the performance of a legislative act." *Brewster* held that Congressmen may be prosecuted for receiving bribes in connection with their legislative acts. The Court stated unequivocally that inquiry into the purpose of a bribe " 'does not draw in question the legislative acts of the defendant * * * or his motives' " (408 U.S. at 526) and therefore does not violate the Speech or Debate Clause. The words "any showing" on the very next page of the Court's opinion could not have been intended to comprehend evidence that a bribe was actually paid or a demand for payment made after the performance of a legislative act. At minimum, the outcome in *Brewster* implies that evidence of actual payments or evidence of demands for payments by a Congressman is admissible under the Speech or Debate Clause, irrespective of whether the payments or demands occurred before or after the performance of a legislative act.

The contrary rule, advocated by respondent and adopted by the courts below, would produce absurd results. A Congressman could be indicted for taking a bribe, but a witness could not testify that he saw the Congressman take the bribe, because that might indicate to the jury that the Congressman had previously performed a legislative act. Likewise, a Congressman could be charged with soliciting a payment for some past favor in the House or Senate, but a

witness could not testify that he heard the Congressman commit the crime, because the request for a gratuity might reveal the earlier legislative conduct. This cannot be the law. If the Speech or Debate Clause permits the indictment of Congressmen for violating 18 U.S.C. 201(c) and 201(g), then surely it must permit the introduction of direct eyewitness testimony that the defendant committed the offense charged.

The opinion in *Brewster* also suggests that introduction of the remainder of the testimonial evidence offered by the government in the present case is consistent with the Speech or Debate Clause. Beneficiaries of private immigration bills and others involved in the alleged bribery scheme would testify that respondent and DeFalco reported to various persons that private bills for which payment had been made were in fact introduced. The government's witnesses would also testify that DeFalco sometimes demanded payment on behalf of respondent and that DeFalco advised persons who were the subject of private bills not to cooperate with federal investigators. All testimony of this kind, identified by italics in the government's narrative offer of proof (78-349 Sp. App. 2-11), concerns statements made outside Congress, statements that are not themselves legislative acts and are not part of "the *due* functioning of the [legislative] process" (408 U.S. at 516).

This Court in *Brewster* defined a "legislative act" as "an act generally done in Congress in relation to

the business before it" (408 U.S. at 512).[23] The Court carefully distinguished such acts from the broad spectrum of "entirely legitimate activities" that Members of Congress regularly perform for political rather than legislative reasons. These latter activities, in-

[23] The Court correctly stated that the coverage of the Speech or Debate Clause has consistently been limited to "those things generally said or done in the House or the Senate in the performance of official duties and * * * the motivation for those acts" (408 U.S. at 512). Earlier civil cases raising questions of legislative privilege may have created the impression that the Clause sweeps more broadly, but as the Court noted (*id.* at 515-516), the "sense of those cases, fairly read" is not contrary to the definition of "legislative act" set forth in *Brewster*. *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 204, for example, said that the Speech or Debate immunity extends to "things generally done in a session of the House by one of its members in relation to the business before it." This formulation is almost identical to the one used in *Brewster* and was applied in *Kilbourn* to cover the act of voting for a resolution of the House of Representatives, unquestionably a legislative act. In *Coffin* v. *Coffin*, 4 Mass. 1 (1808), a case construing a state constitution's counterpart to the Speech or Debate Clause, the court said that the provision embraced every "act resulting from the nature, and in the execution, of the office; * * * every thing said or done by * * * a representative, in the exercise of the functions of that office" (*id.* at 27). The court then held, somewhat incongruously, that the provision did not cover a private conversation between legislators on the floor of the state house of representatives concerning a subject that only moments earlier had been before the whole house for its consideration. See also *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 376, holding that state legislators enjoy a common law immunity from civil suit arising from conduct within "the sphere of legitimate legislative activity." The immunity was applied in *Tenney* to protect a state legislator's alleged harassment of a witness before a legislative hearing.

cluding "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress," cannot claim the protection of the Speech or Debate Clause. *Ibid.*; see also *Doe* v. *McMillan*, 412 U.S. 306, 313 (1973); *Gravel* v. *United States*, 408 U.S. 606, 624-625 (1972) (the Clause reaches only matters that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House").

Respondent in the present case does not dispute the characterization of his own and DeFalco's statements outside Congress as nonlegislative acts. He apparently concedes that all the statements and events to which government witnesses would testify are not themselves legislative acts. He nonetheless argues that a large portion of the testimony must be suppressed because many of the conversations that would be recounted in the testimony refer to past legislative acts, *viz.*, the introduction of private immigration bills. This result is neither logically sound nor required by the language in *Brewster* stressed by respondent. Indeed, the *Brewster* opinion read as a whole supports the conclusion that the proffered testimony is admissible.

The district court and court of appeals, by adopting respondent's position, have injected a peculiar temporal element into the set of considerations relevant to the admissibility of evidence under the Speech or Debate Clause. If respondent is correct, and the Clause does prohibit introduction of any evidence that tends to prove the performance of a legislative act, then it should not matter whether a particular piece of evidence refers to a future or a past legislative act. The district court stated (78-349 Pet. App. 59a) that "the Speech or Debate Clause creates no impediment to the introduction of evidence of an agreement by [respondent] to perform *in futuro* a legislative act. What is forbidden is the introduction of evidence of his past performance of such an act." The source of this past-future distinction is unclear. If the words "any showing" in the *Brewster* opinion are to be read broadly to refer to any evidence tending to show the performance of a legislative act, then documents and testimony concerning events, statements, and agreements preliminary to the performance of such an act should be just as objectionable as evidence that the act has already occurred. While the statement "I will introduce your bill tomorrow" may be somewhat less probative of the fact of introduction of the bill than the statement "I introduced your bill yesterday," both statements tend to prove the performance of a legislative act, and neither constitutes conclusive proof (*i.e.*, the latter statement could be deliberately false or mistaken). In either case the jury is presented with some indication that

a Member of Congress did in fact engage in conduct, inquiry into which is barred by the Speech or Debate Clause. Cf. *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285, 295-296 (1892); *United States* v. *Annunziato*, 293 F.2d 373, 377-378 (2d Cir.), cert. denied, 368 U.S. 919 (1961); *United States* v. *Calvert*, 523 F.2d 895, 910 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976). The government's ability to introduce sufficient evidence to convict a Congressman on bribery charges should not depend on the fortuitous and logically insignificant matter of the timing of incriminating statements and events.

Apart from the logical flaws inherent in the past-future distinction, that criterion in any event does little to foster the objectives of the Clause as delineated in *Brewster*. *Brewster* settles that the Speech or Debate Clause does not immunize Congressmen from prosecution for receiving bribes to influence them in the performance of their legislative duties. The ultimate facts that the prosecution must prove in this case are that respondent accepted money with the knowledge that it was being paid to him for the purpose of influencing his official actions. The acts and conversations that the government seeks to introduce, and that the courts below have excluded, are probative both of the fact of receipt of money and of respondent's state of mind in soliciting and receiving the payments, both of which may be proved without violation of the Clause. While the evidence in question may incidentally refer to or by its nature suggest that respondent performed specific legislative

acts, its value to the prosecution is entirely independent of any legislative acts that respondent may in fact have performed.[24] The task of the Court in this case is to determine whether such incidental references to legislative acts offend the constitutional privilege.

The passages from the Court's opinion in *Brewster* on which respondent relies were written in answer to Mr. Justice White's assertion (408 U.S. at 553-555) that the majority's decision could not be reconciled with the holding in *Johnson*. The Court replied by reaffirming that "*Johnson* precludes any showing of how [a defendant Congressman] acted, voted, or decided" and that "evidence of acts protected by the [Speech or Debate] Clause is inadmissible" (*id.* at 527, 528). The meaning of these statements can only be understood by reference to *Johnson*, the case from which the statements were derived.

Johnson involved a criminal charge that by its nature could not be proved without inquiry into a legislative act and its motivation. The government introduced into evidence the text of a speech delivered on the floor of the House of Representatives; the prosecution also questioned Representative Johnson and others about the reasons for the speech and the method of its preparation. This is what the Court in

[24] The evidence here is thus materially different from evidence directly showing the performance of the legislative act itself, submitted for the purpose of persuading the jury to infer from the fact of performance of the legislative act that the defendant received the money or that he did so with the requisite criminal intent.

Brewster had in mind when it spoke of "evidence of acts protected by the [Speech or Debate] Clause" and a "showing of how [a Congressman] acted, voted, or decided." Those phrases were not intended to encompass testimony of the kind at issue here in connection with a prosecution of the kind at issue here.

The offenses charged in the indictment against respondent are not part of the legislative process. Proof of the elements of those offenses does not require proof of acts that are part of the legislative process. The disputed testimony would relate acts and statements that are not part of the legislative process. The testimony would not be offered for the purpose of showing the performance of a legislative act. Indeed, the truth or falsity of the statements made by respondent and DeFalco outside Congress is immaterial. Whether respondent actually introduced private immigration bills is of no consequence. The important thing is not what respondent did but what he said he did and how his statements and actions reflect his knowledge and intent in receiving payments. The government's witnesses would testify that respondent and DeFalco made statements designed to create the impression that respondent had introduced and would continue to introduce private bills in exchange for money. These statements tend to show the existence of the illegal bribery scheme charged in the indictment, whether or not any legislative acts were in fact performed. Under these circumstances, the Speech or Debate Clause does not

require suppression of the proffered evidence, even though some of the statements made by respondent and DeFalco outside Congress may refer back to private bills that actually were introduced.[25]

The foregoing discussion does not address the admissibility of the documentary evidence produced by respondent before the grand juries. Included among that evidence are copies of the private immigration bills that respondent introduced on behalf of some of his constituents. Also included is correspondence with DeFalco and with the beneficiaries of the private bills. The bills themselves, of course, are legislative acts. The line of argument pursued above would not necessarily support their introduction into evidence, because unlike the proffered testimony, the bills would directly show the performance of a legislative act, they would show nothing but the performance of a legislative act, and they would be relevant only because they would establish that respondent executed

[25] This approach was adopted by the district court in *United States* v. *Garmatz*, 445 F. Supp. 54, 64-65 (D. Md. 1977);

> [D]iscussions relating to the giving or receiving of a bribe would not be barred at the trial, nor conversations of coconspirators which might be casually or incidentally related to legislative affairs.
>
> * * * * *
>
> The question before this Court when the proffers are made will be whether the government is seeking to introduce direct evidence of the performance of a legislative act as that term was defined in *Brewster* and *Gravel*, not whether the legislative act in question was performed in the past or in the future.

his part of the illegal bargain. These differences are sufficiently significant to require exclusion of the bills under *Johnson* and *Brewster*, unless respondent effectively waived his Speech or Debate Clause privilege (see pages 106-123, *infra*).[26]

The correspondence poses a more difficult problem, one that can probably be resolved most efficiently by the district court on a letter-by-letter basis in light of guidance provided by this Court's decision. The admissibility of each letter should depend on whether it is a legislative act, within the meaning of that term as used by this Court in the past.[27]

[26] Likewise, respondent's grand jury testimony, in which he describes his introduction of the private bills and his reasons for taking that action, would be admissible in the government's case-in-chief only if respondent waived his Speech or Debate Clause privilege.

[27] An examination of the representative letters reproduced in the special appendix to the government's petition indicate that individual letters may present troublesome problems of classification. For example, the letter in which respondent asks the beneficiaries of a private immigration bill to provide information necessary for consideration of that bill by the appropriate congressional subcommittee (see 78-349 Sp. App. 16-17) may well be a legislative act in the same sense that participation in a committee hearing or an information-gathering investigation is a legislative act. Particularly in view of the private nature of the bills involved, correspondence of this kind conceivably is the only way in which to obtain the information required for the proper functioning of the legislative process. In any event, it is the way chosen by respondent, and that may be sufficient to justify invocation of the Speech or Debate Clause privilege.

By contrast, other letters seem substantially less likely to qualify as "an integral part of the deliberative and communicative processes by which Members participate in House

Letters that are not themselves legislative acts, but that simply refer to legislative acts performed in the past, such as the introduction of private bills, should be admissible for the same reasons that the government's proffered testimonial evidence should be admissible. The government wishes to use the letters not to show the occurrence of any legislative acts, but to show respondent's role in a scheme to introduce private bills in return for payment. The conduct for which respondent was indicted—the taking of a bribe—is not protected by the Speech or Debate Clause, and the letters, if they are not legislative acts, are also not protected by the Clause. In this situation, the constitutional provision does not require that the letters be excluded solely because they refer to the past performance of a legislative act.[28]

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proceedings" (*Gravel* v. *United States, supra,* 408 U.S. at 625). In this group are letters from respondent to his constituents merely informing them of the status of private bills introduced on their behalf (see 78-349 Sp. App. at 21-25), letters from respondent to DeFalco (after he was no longer employed on respondent's staff) reporting on the introduction and progress of private bills (see *id.* at 12, 15), and, especially, letters *from constituents* to respondent providing requested information (see *id.* at 18-20).

[28] With respect to the first question presented in the government's petition, the concern of the Speaker of the House and the Chairman of the House Administration Committee as amici curiae appears to be limited to the private immigration bills themselves and respondent's correspondence with his constituents and DeFalco (see Br. for Amici 47-57). Amici's misgivings are groundless, however, because, as the discussion in the text demonstrates, the government does not contend in this Court that those bills and letters that are legislative acts are admissible even in the absence of a waiver of privilege.

If the Court agrees with this position, the desirable course would be remand to the district court for a determination of the admissibility of each letter under the correct standard. The letters reprinted in the government's special appendix are typical of the correspondence produced by respondent before the grand juries, but there may be individual variations in letters not reproduced that would affect the decision whether they should be classified as legislative acts. No single letter is indispensable to the government's proof on any count of the indictment, and, under these circumstances, considerations of judicial economy suggest that determinations of admissibility be left in the first instance to the district court.

3. *Strong policy considerations support the admission of the testimonial evidence proffered by the government.*

Thus far, our argument has been devoted to showing that the evidentiary ruling under review does not comport either with the history of the Speech or Debate Clause or with the prior decisions of this Court. Perhaps equally important are the strong policy considerations that counsel against expansion of the evidentiary privilege to shield statements or events outside Congress that are not themselves legislative acts but that incidentally refer to or imply the performance of past legislative acts.

a. The language of the Speech or Debate Clause establishes only a limited evidentiary privilege. It provides that a Member of Congress cannot be questioned outside Congress about legislative acts.

This privilege is not at all implicated here. The Constitution does not say in addition that evidence of or evidence referring to legislative acts shall not be admitted in any judicial proceeding. Rather, an evidentiary privilege of that nature is a judicial creation deemed necessary to protect and make meaningful the constitutional immunity from judicial punishment for legislative acts. The core content of the privilege was recognized in *Brewster* and *Johnson*; a dramatically expanded version has been applied by the court of appeals in the present case. Because the privilege is not delineated by the textual commands of the Constitution, this Court has considerable latitude in limning its boundaries. The Court should perform that task, we submit, with due regard for both the need of the criminal justice system to achieve accurate resolution of serious criminal charges and the requirement of the Speech or Debate Clause that Senators and Representatives be immune from liability for legislative acts.

Successful claims of privilege entail significant costs. Probative evidence is removed from the factfinder's consideration and the judicial search for truth is thereby hindered. Assertions of evidentiary privilege should be sustained only when the benefits produced will outweigh the loss to the factfinding process. As Dean Wigmore taught:

> For more than three centuries it has now been recognized as a fundamental maxim that the public * * * has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule * * *.

8 *Wigmore on Evidence* § 2192, at 70 (J. McNaughton rev. 1961), quoted in *United States* v. *Bryan*, 339 U.S. 323, 331 (1950).

United States v. *Nixon*, 418 U.S. 683 (1974), is instructive in this regard. The Court there refused to recognize an absolute executive privilege because of the impediment it would "place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions" (*id.* at 707). Although the Court acknowledged a qualified executive privilege protecting the confidentiality of Presidential communications, it ruled that the privilege may at times be forced to yield to the "legitimate needs of the judicial process" (*ibid.*). The Court stressed that evidentiary privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth" (*id.* at 710). Claims of executive privilege, the Court concluded (*id.* at 711-713), must be resolved through a balancing process, weighing the importance of the privilege to the effective performance of official responsibilities against the specific need for relevant evidence in the fair adjudication of a particular criminal case.

In applying the evidentiary privilege derived from the Speech or Debate Clause, courts must evaluate the likelihood that the admission of certain evidence will result in a breach of legislative immunity. Courts must decide, in other words, whether there is any significant possibility that introduction of the disputed evidence will lead to a finding of liability, not on some legitimate basis, but on the basis of conduct protected by the Clause. When there is no such significant possibility, or when any such possibility is outweighed by the need for specific evidence in connection with a prosecution for nonlegislative acts, the judicial interest in accurate and reliable factfinding should prevail, and relevant evidence should be admitted, even if it does contain a reference to a past legislative act. The breadth of the privilege depends ultimately on the claimant's ability to demonstrate that particular kinds of evidence should be excluded in order to preserve legislative independence. When the values underlying the Speech or Debate Clause are not threatened, there is no need to reject probative evidence in deference to a legislative privilege.

James Madison recognized this point nearly 150 years ago, in a letter commenting on a speech by Philip Doddridge regarding the congressional privilege. Madison wrote: "In the application of this privilege to emerging cases, difficulties and differences of opinion may arise. In deciding on these the reason and necessity of the privilege must be the guide." 4 J. Madison, *Letters and Other Writings* 221 (1865).

The thought was echoed by the opinion in *Brewster*, where the Court declared that the legislative privilege "does not extend beyond what is necessary to preserve the integrity of the legislative process." 408 U.S. at 517.

Admission of the government's testimonial evidence in the present case would not jeopardize congressional independence. It strains credulity to suppose that any Senator or Representative would be inhibited in the diligent performance of his duties by a fear that conversations outside Congress referring to his legislative acts could be admitted against him in a prosecution for bribery. Thus reduced to its essentials, respondent's position reveals its inherent implausibility. The suppression of evidence ordered by the district court and endorsed by the court of appeals simply would not promote the goals of the Speech or Debate Clause. See *United States* v. *Brewster*, *supra*, 408 U.S. at 524-525.

b. Suppression under the sweeping standards adopted by the courts below would, however, have the predictable result of making bribery prosecutions of Congressmen nearly impossible, except in situations where an exchange of funds takes place prior to the performance of any legislative act[29] or in the rare case in which a legislator's agreement to receive a

[29] Even in such cases the prosecution would, in practice, often be crippled by an inability to show corrupt knowledge and intent through evidence of nonlegislative acts and statements transpiring after the performance of some legislative act.

bribe can be proved solely on the basis of statements and events that do not refer to any completed legislative act and that afford no basis for inferring the performance of such an act. Such a development would hardly contribute to legislative integrity. Moreover, it would force Congress to shoulder the entire burden of policing the activities of its Members in cases where bribes or gratuities may have been paid for past legislative acts. It would do so notwithstanding the clearly expressed legislative policy, reflected in Section 201, to commit such cases to judicial resolution.

Despite the representations of amici concerning the internal disciplinary capabilities of the House and Senate (Amici Br. 16-27), this Court's observation in *Brewster* remains sound: "Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process." 408 U.S. at 518. Unlike Parliament, Congress is not and never has been a court or judicial body. Ethical standards established by Congress for its Members do not define prohibited conduct with the same detail and specificity found in the federal criminal code.

Not only do the governing behavioral standards invest Congress with an even greater degree of prosecutorial discretion than is exercised by the United States Attorneys, but the procedural protections afforded to Members involved in congressional disciplinary proceedings are not nearly as well developed as those enjoyed by defendants in criminal

trials. Most notably, a single House of Congress must serve simultaneously as "accuser, prosecutor, judge, and jury * * *." 408 U.S. at 519. Furthermore, the intrusion of political motives into the disciplinary process is an ever-present danger. As the Court said in *Brewster* (*id.* at 519-520), "it would be somewhat naive to assume that the triers would be wholly objective and free from considerations of party and politics and the passions of the moment."

By undertaking disciplinary measures against its own Members, Congress unavoidably would divert its attention from the lawmaking activities that are its primary function. In addition, it is not clear that congressional jurisdiction is adequate to the task. In a case like the present one, Congress might well be unable to reach and punish misconduct performed by a legislator while a Member of the House or Senate but not discovered or fully investigated until after he has left office. And a substantial question may exist about the ability of a particular Congress to impose sanctions that extend beyond the life of that Congress. See *United States* v. *Bryan*, 339 U.S. 323, 327 (1950).

c. Respondent's argument in support of the district court's suppression of probative evidence only incidentally referring to legislative acts appears to rest on the assumption that admission of the government's proffered testimony would open the door to dangerous executive abuses of the prosecutorial function and direct interference by the Executive Branch in the legislative process. This Court fully answered

such concerns in *Brewster*. In the first place, the history of this Nation "does not reflect a catalogue of abuses at the hands of the Executive" similar to that which gave rise to the English antecedents of the Speech or Debate Clause. 408 U.S. at 508. More important, the potential for abuse feared by respondent is "inherent in a system of government that delegates to each of the three branches separate and independent powers." *Id.* at 522. This is the point of the "check and balance mechanism" established by the Framers (*id.* at 523).

As the Court stated in *Brewster* (*id.* at 522-523 n. 16), "[t]he Legislative Branch is not without weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members." Completely apart from its power of the purse, Congress has within its exclusive control perhaps the most obvious remedy for a perceived threat of harassment from unwarranted bribery prosecutions. By statutory amendment, the Legislative Branch can simply exempt its Members from the reach of the federal bribery laws. See *id.* at 524. It can also enact a rule of evidence barring admission of testimony of the kind at issue in this case. In light of these available safeguards and the lack of historical evidence of abuse in this country, the evidentiary privilege derived from the Speech or Debate Clause need not and should not be given the sweeping scope urged by respondent. Admission of the government's proffered testimony in this case will materially advance a legitimate criminal prosecution

without jeopardizing legislative independence and integrity.

Finally, one policy consideration offered in support of the court of appeals' decision merits a brief response. The court of appeals stated (78-349 Pet. App. 29a) that admission of the government's testimonial evidence "would discourage the dissemination to the public of information about legislative activities." It will have no such effect. It is incredible to assume that Senators and Representatives will voluntarily curtail their efforts to publicize their achievements in Congress solely in order to prevent the finder of fact in some subsequent criminal trial from learning of specific legislative acts. Such precautionary measures would be contrary to prior experience with congressional behavior and contrary to the Members' own interest in informing their constituents of their legislative accomplishments. Fortunately, the vast majority of Senators and Representatives confront little if any prospect of criminal prosecution. Receipt into evidence of respondent's conversations outside Congress referring incidentally to his introduction of private bills could not possibly prompt Members of Congress to restrict the distribution of information concerning their legislative activity.

This Court implicitly recognized as much in *Gravel* v. *United States*, *supra*, and *Doe* v. *McMillan*, *supra*. In *Gravel*, the Court held that the Speech or Debate Clause does not foreclose inquiry into the private publication of the record of a congressional com-

mittee hearing. In *Doe*, the Court approved inquiry into the distribution of official congressional committee reports outside Congress, even though petitioners' suit inevitably focused not only on the fact that a report was issued but also on the contents of the report. These decisions simply reinforce the conviction that, in the context of an effort to impose civil or criminal liability for nonlegislative acts, other nonlegislative acts should be admissible in evidence, even if they contain references to the past performance of conduct protected by the Speech or Debate Clause.

B. When a Member of Congress is prosecuted for receiving a bribe, in violation of 18 U.S.C. 201, evidence referring to legislative acts is admissible, because Section 201 is "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members."

The second theory on which introduction of the government's proffered evidence can be sustained is derived from *United States* v. *Johnson*, *supra*, 383 U.S. at 185. The Court there expressly reserved for future consideration the validity *vel non* of

> a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.

The bribery provision in the federal criminal code, 18 U.S.C. 201, applies in terms to Members of Con-

gress [30] and qualifies as a "narrowly drawn statute" within the meaning of the Court's opinion in *Johnson*. Congress has the constitutional power to commit to the Executive and Judicial Branches the investigation, trial, and punishment of offenses related to the legislative process. Section 201 represents an exercise of that power. Accordingly, assuming *arguendo* that the government's proffered evidence in this case would otherwise be inadmissible under the Speech or Debate Clause, introduction of that evidence is nonetheless acceptable here, because it is offered to prove an offense under Section 201, a narrowly drawn statute specifically applicable to Members of Congress.

Article I, Section 5 of the Constitution empowers Congress to punish its own Members.[31] *Powell* v. *McCormack*, *supra*, 395 U.S. at 548; *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 189-190. In an appropriate case such punishment may even include imprisonment. *Ibid.* This power of the Legislative Branch to discipline its own Members was recognized in England and the colonies well before the adoption of the American Constitution. See pages 39-40 *supra*; Brief for the United States in *Brewster* (No.

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[30] Section 201(c) prohibits public officials from soliciting or receiving anything of value in return for being influenced in the performance of an official act. Section 201(a) defines "public official" to include Members of Congress.

[31] Clause 2 of Section 5 provides: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and with the Concurrence of two thirds, expel a Member."

70-45, 1971 Term) 12-19. Indeed, members of the colonial legislatures were frequently punished by censure, admonition, fine, or imprisonment, either for unexcused absences from the house or for violating specific rules governing legislative proceedings or more general regulations dealing with members' conduct. M. Clarke, *Parliamentary Privilege in the American Colonies* 73-74, 177, 181-182, 184 (1971). In addition, as amici observe (Amici Br. 15), there have been several instances in which the Senate or House of Representatives has disciplined one or more of its Members, either for legislative misconduct or for behavior outside Congress detrimental to the integrity of the Legislative Branch. See McLaughlin, *Congressional Self-Discipline: The Power to Expel, to Exclude and to Punish*, 41 Fordham L. Rev. 43, 65-66 (1972).

Congress may enlist the aid of the Executive Branch and the courts in exercising its Article I power to discipline its Members. Under the general legislative power provided in Article I, Section 1 and under the Necessary and Proper Clause in Article I, Section 8, Congress may enact laws providing for the criminal punishment of misconduct by its Members. This Court has sustained the constitutionality of criminal prosecutions under such a statute. *Burton* v. *United States*, 202 U.S. 344, 365-370 (1906).[32] See also

[32] *Burton* affirmed the conviction of a United States Senator for taking money in return for his efforts before the Post Office Department on behalf of a grain and securities company under investigation by the Postmaster General for possible mail fraud. The Senator's conduct violated Rev. Stat. 1782, 13 Stat. 123, a predecessor of the current conflict-of-interest statute, 18 U.S.C. 203.

United States v. *Johnson*, 419 F.2d 56 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970); *May* v. *United States*, 175 F.2d 994 (D.C. Cir.), cert. denied, 338 U.S. 830 (1949). Although Congress itself could impose sanctions against its Members for the conduct proscribed by these statutes, it has chosen to share its power with the Executive and Judicial Branches by explicitly making criminal certain official misconduct.[33] In addition, of course, Congress has not chosen to exempt its Members from the operation of the general provisions of the federal criminal code and thus relies on the courts and the executive to deal with possible criminal behavior outside a Congressman's official capacity.

The question reserved in *Johnson* is whether the Speech or Debate Clause precludes Congress from delegating its authority to punish its own Members, where proof of the offense charged would entail inquiry into legislative acts or motivations. We have argued above that proof of the first four counts in respondent's indictment would not entail any such inquiry, and we of course adhere to that position. But

[33] Analogously, Congress has enacted legislation making a witness's refusal to answer questions before Congress or a congressional committee a misdemeanor punishable by a court. See 2 U.S.C. 192. Congress has taken this step even though it could itself punish such refusals as contempt. This Court has upheld the constitutionality of Congress's decision to share its power with the other two Branches. *In re Chapman*, 166 U.S. 661, 671-672 (1897); *Jurney* v. *MacCracken*, *supra*, 294 U.S. at 151-152. See also *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 189-190.

even if respondent's bribery prosecution would involve some examination of his legislative conduct, Congress has the power to authorize such an inquiry and has done so in 18 U.S.C. 201.

The purpose of the Speech or Debate Clause is "to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States* v. *Brewster*, *supra*, 408 U.S. at 507. By enacting Section 201 and earlier versions of the same statute, Congress has demonstrated its belief that bribery prosecutions of Senators or Representatives will not detract from the independence of the Legislative Branch or harm the integrity of the lawmaking process. Although the legislative history of the federal bribery provisions is not extensive, it suggests that Congress thought the statutes would have precisely the opposite effect, *i.e.*, they would protect Congressmen from legislative trials apt to be influenced by political factors and at the same time would promote public confidence in the integrity of a Legislative Branch that had displayed a willingness to allow its own Members to be tried in an impartial forum over which it has no control.

The original precursor of Section 201 was enacted in 1853. 10 Stat. 170, 171. The debate in the House of Representatives shows Congress's desire to pass a bill that would set clear standards of conduct and sharply reduce the role of political considerations in the handling of official misconduct. Representative Stephens declared (Cong. Globe, 32d Cong., 2d Sess. 291 (1853)):

> I am for establishing a rule by which every one can regulate his conduct, and then right and wrong will not be left to the capricious judgment of friend or foe. Let it be written in the law, and then all can equally stand or fall by the law, and not the uncertain standard of men's opinions.

The Speech or Debate Clause was not mentioned during the debate, and there was no suggestion that prosecutions under the proposed statute might undercut the protections afforded by the Clause.

More than 100 years later, when Congress comprehensively revised the federal bribery and conflict-of-interest laws in 1962, there was again no indication that Congress feared enforcement of Section 201 might infringe on legislative prerogatives protected by the Speech or Debate Clause. See H.R. Rep. No. 748, 87th Cong., 1st Sess. (1961); S. Rep. No. 2213, 87th Cong., 2nd Sess. (1962); *Conflicts of Interest: Hearings Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962). Rather there appears to have been general agreement that the existing provisions relating to Members of Congress should be continued in effect.

Without evidence of the kind proffered by the government in this case, the task of proving that a Member of Congress received a bribe in return for being influenced in the performance of a legislative act would be exceedingly difficult, if not impossible. It is implausible to assume that for 125 years Congress has provided the statutory authority for bribery pros-

ecutions of its Members but at the same time has recognized that much conduct clearly covered by the statutory proscription cannot be successfully prosecuted because the Speech or Debate Clause bars the introduction of critical evidence. Unless one is willing to make such an unlikely assumption, only two other conclusions can be drawn from the Legislative Branch's longstanding acceptance of criminal bribery laws applicable to its Members. Either Congress believes that enforcement of those laws will not violate the Speech or Debate Clause because it will not entail inquiry into legislative acts (in which case the government's proffered evidence is inadmissible under the first theory, discussed above), or Congress believes that it has the power to authorize such inquiry, notwithstanding the Speech or Debate Clause (in which case the government's evidence is admissible under the second approach, treated here). In either event, Congress's legislatively expressed views on the proper interpretation of the relevant constitutional provisions are entitled to substantial weight.[34]

[34] The brief filed in the present case by the Speaker of the House and the Chairman of the House Administration Committee as amici curiae may diverge in some respects from the position Congress as a whole has endorsed since 1853 through its continued tolerance for and periodic reenactment of federal bribery statutes applicable to Senators and Representatives. The precise nature of amici's position is difficult to ascertain (see Br. 27-40, 63) but to the extent their arguments may differ from the congressional views reflected in enacted legislation, the considered judgment of Congress as an institution performing its lawmaking function must take precedence.

As this Court stated in *United States* v. *Nixon*, *supra*, 418 U.S. at 703, "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."

Assuming for the sake of argument that the evidence offered in this and other prosecutions under Section 201 does entail inquiry into legislative acts, there is still ample reason to conclude that the Speech or Debate Clause does not bar congressional delegation of authority to punish Senators and Representatives. The policy considerations already canvassed (see pages 67-76, *supra*) are equally applicable here. Congress is ill-suited to conduct criminal trials, and the standards by which it would judge its Members' behavior are far less definite than those provided in Section 201. Moreover, an increase in the number of congressional disciplinary proceedings could only impair the ability of the Legislative Branch to perform its lawmaking function. Reliance on the federal judicial system for the fair disposition of bribery accusations against Senators and Representatives serves the dual purpose of relieving the burden on Congress and protecting individual legislators from the danger of politically motivated penalties. In short, if Congress has the power, as respondent and the courts below concede it does, to punish its Members for taking bribes, and if Congress chooses, on a limited basis, to enlist the executive and the courts as partners in the exercise of that power, the inde-

pendence of the Legislative Branch is not threatened and there is no violation of the Speech or Debate Clause.[35]

[35] There may be an appearance of inconsistency between the position advocated here and the discussion of waiver in Part III, *infra*, but closer examination shows that any disparity is at most superficial. We argue in Part III that an individual Senator or Representative who wishes to waive his evidentiary privilege under the Speech or Debate Clause may do so. We argue here that Congress as an institution, in the exercise of its power to punish under Article I, Section 5, may authorize inquiry into the legislative acts of its Members, even without the consent of the individual Members whose conduct is questioned. Some authorities would apparently agree with the first proposition but not the second. See, *e.g.*, *United States* v. *Brewster*, *supra*, 408 U.S. at 547 (Brennan, J., dissenting) ("a personalized legislative privilege not subject to defeasance even by a specific congressional delegation to the courts"); *Coffin* v. *Coffin*, *supra*, 4 Mass. at 27 (interpreting a state constitutional provision to confer a privilege to which each member is entitled, "even against the declared will of the house"). These views stress the personal nature of the legislative privilege, but do not take adequate account of the underlying purpose of the Speech or Debate Clause.

The Clause does confer an immunity and a privilege on individual legislators, but it does so only because the Framers regarded such a measure as a necessary instrument for the achievement of a higher goal, namely, the protection of the independence and integrity of the Legislative Branch. As this Court said in *Brewster* (408 U.S at 507):

> The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.

We contend in Part III that if a particular Senator or Representative concludes that his freedom and sense of personal security will not be impaired by a waiver of his constitutional

If the foregoing argument is correct, the only question that remains is whether 18 U.S.C. 201 is a "narrowly drawn statute" within the contemplation of this Court's reservation in *Johnson*. We submit that it is.

The meaning of the phrase "narrowly drawn statute," as the Court used it in *Johnson*, can only be understood by reference to the conviction there under review. Representative Johnson was convicted of violating 18 U.S.C. 371, the general federal conspiracy statute. Because of that statute's broad applicability to all agreements to defraud the United States, the Court could not know whether Congress contemplated that it should cover the conduct of a

protections, there is no reason to believe the Speech or Debate Clause will be offended by such a waiver. The purpose of the Clause is fully served as long as the individual legislator knows the privilege is available if he wants to claim it. On the other hand, if Congress as an institution decides to permit inquiry, in certain well-defined circumstances, into its Members' legislative acts, the purpose of the Clause is also served, notwithstanding the possible objections of dissenting legislators. If the Legislative Branch itself determines that a particular kind of inquiry into legislative acts will not adversely affect congressional independence, the policies of the Clause are not in the least offended by deference of the other branches of government to that judgment. This is all the more true because, if experience reveals the legislative judgment to have been faulty, Congress retains the ability to correct its mistake. There is thus no inconsistency in the position that an individual Congressman can waive his own privilege and Congress as a body can waive the privilege of its Members. Both aspects of the argument are faithful to the rationale of the Speech or Debate Clause.

Senator or Representative in connection with the delivery of a speech on the floor of either House.

No such uncertainty surrounds Section 201, however. The specific wording of that statute eliminates all doubt that Congress intended to provide for the punishment of Members who solicit or receive bribes. The definition of "public official" in Section 201(a) explicitly includes Members of Congress, and the statutory description of the "official acts" that may be subject to improper influence unquestionably encompasses the introduction of proposed legislation by Senators or Representatives.

Appellee in *Brewster* argued that, despite its clear applicability to Members of Congress, Section 201 is not a "narrowly drawn statute" within the meaning of *Johnson*. Br. for Appellee (No. 70-45, 1971 Term) 72-83. Senator Brewster contended that *Johnson* used the phrase "narrowly drawn statute" in the same way the Court used it in First Amendment overbreadth cases (see, *e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1940); *Elfbrandt* v. *Russell*, 384 U.S. 11, 18-19 (1966); *Ashton* v. *Kentucky*, 384 U.S. 195, 200-201 (1966); *Whitehill* v. *Elkins*, 389 U.S. 54, 62 (1967)), and that Section 201 is not "narrowly drawn" because its description of prohibited conduct is too sweeping. Brewster maintained that, because Section 201's definition of bribery is "lacking in specificity" and susceptible to a broad interpretation, the statute could have a chilling effect on legislative conduct. There are several responses to this argument.

If the concern is that the precise boundaries of Section 201 are not easily ascertainable, the simple answer is that this is not a case near the outer limits. Section 201 does permit the imposition of punishment for an unconsummated agreement to receive a bribe or gratuity in return for a legislative act, but two of the three substantive counts in the present indictment charge that respondent actually received his bribes, and the third substantive count charges a solicitation and illegal agreement that is directly related to the criminal scheme described in the rest of the indictment. Whatever may be the appropriate disposition in a case where it is not clear that a Congressman's conduct is prohibited by Section 201, any uncertainty about the provision's reach is insignificant here, where the alleged offenses fall squarely within the statute's compass.

If the concern is that the necessity for a determination of criminal intent under Section 201 reposes too much discretion in the hand of the jury, the answer is plainly that the jury is always charged with the responsibility of deciding whether a particular defendant has the requisite criminal intent in connection with a potentially illegal agreement. The rule should be no different when the defendant is a Congressman, instead of another public official or a private citizen. Unless the phrase "narrowly drawn statute," as used in *Johnson*, can never include a statute that punishes inchoate crimes for which a jury determination of intent is critical, Section 201 should not fail the "narrowness" test on this ground.

Finally, if the concern is that the breadth of Section 201 may cause Senators and Representatives to adjust their conduct in undesirable ways in order to avoid the possibility of running afoul of the bribery law, the answer is that Congress itself can eliminate any perceived restrictions on legitimate legislative behavior by the simple expedient of amending the statute. Unlike the situation in the First Amendment cases cited by appellee in *Brewster*, here the putative "victims" of an overbroad criminal statute are the very persons who have it within their immediate power to change that statute. The persons regulated are the very ones doing the regulating. In these circumstances, the possibility that the longstanding federal bribery provisions will have an improper "chilling effect" on Members of Congress is insubstantial and does not remove Section 201 from the category of "narrowly drawn statutes," as that phrase was used in *Johnson*.

II.

BREWSTER ESTABLISHES THE CONSTITUTIONALITY OF THE FIRST FOUR COUNTS IN RESPONDENT'S INDICTMENT, AND THE COURT OF APPEALS PROPERLY REFUSED TO ISSUE A WRIT OF MANDAMUS BARRING RESPONDENT'S TRIAL ON THOSE COUNTS

Much of what has been said in Part I is, of course, relevant to the validity of the first four counts of respondent's indictment. Unlike the question already discussed, however, the three questions presented in respondent's petition (No. 78-546) all involve matters of settled law. That is why we deemed it advis-

able to depart from chronological organization and address first the substantial open question concerning the kinds of evidence that may be used to prove criminal charges like those sustained in *United States* v. *Brewster, supra*. Respondent's attack on his indictment is foreclosed by the decision in *Brewster*, and he is in any event not entitled to the extraordinary remedy he sought from the court of appeals. The current procedural posture of respondent's case only reinforces the independent conclusion that relief should be denied because the challenge to the indictment is without merit.

A. Apart From the Merits of Respondent's Arguments, This is Not an Appropriate Case for Mandamus.

This Court has repeatedly held that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations" and only when "the party seeking issuance of the writ ha[s] no other adequate means to attain the relief he desires * * *." *Kerr* v. *United States District Court*, 426 U.S. 394, 402, 403 (1976). See also *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 661-662 (1978) (plurality opinion); *Will* v. *United States*, 389 U.S. 90, 95-98 (1967); *Parr* v. *United States*, 351 U.S. 513, 520-521 (1956); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-383 (1953). In particular, the Court has said that "[o]rdinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record." *Roche* v. *Evapo-*

rated Milk Ass'n, 319 U.S. 21, 27-28 (1943). Moreover, the decisions establish that "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr* v. *United States District Court, supra*, 426 U.S. at 403.

Applying these standards, the court of appeals properly refused to grant the relief sought by respondent (78-349 Pet. App. 9a-21a). Respondent can present his Speech or Debate Clause claims to the court of appeals on review of a final judgment of conviction, if such a judgment is ever entered in the district court. At that time he will have a full opportunity to challenge the district court's denial of his motion to dismiss the indictment. In the meanwhile, respondent may be acquitted at trial and thereby render further appellate review unnecessary. Mandamus at the present stage is an undesirable form of review because it ignores this Court's frequently stated policy against interlocutory consideration of pretrial orders in criminal cases. *United States* v. *MacDonald*, 435 U.S. 850, 853 (1978); *DiBella* v. *United States*, 369 U.S. 121, 124 (1962); *Cobbledick* v. *United States*, 309 U.S. 323 (1940).

Respondent insists (Br. 37-38), however, that the very fact of a trial on the first four counts of the indictment, regardless of its outcome, would violate the Speech or Debate Clause. He observes that the Clause is intended to protect Senators and Representatives from the burden of defending themselves against improper criminal charges and civil suits, as well as from the imposition of liability on the

basis of legislative acts. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504 (1975); *Powell* v. *McCormack, supra*, 395 U.S. at 505; *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967). In this respect, he asserts, the Speech or Debate Clause is analogous to the Double Jeopardy Clause; the effect of both is to prevent not only the imposition of criminal sanctions, but also the distraction and expense of a trial. Accordingly, respondent contends, the denial of a motion to dismiss on Speech or Debate Clause grounds should be appealable before trial, just as the denial of a motion for similar relief on Double Jeopardy grounds is appealable before trial under this Court's decision in *Abney* v. *United States*, 431 U.S. 651 (1977).

The short answer to this contention is that, if it is correct, respondent should have filed a timely appeal, not a petition for a writ of mandamus more than three months after the district court's decision and well after the time for appeal had expired. See Fed. R. App. P. 4(b). Respondent attempts to excuse his delay (Br. 56) on the ground that this Court only decided *Abney* in June 1977 and that his petition for a writ of mandamus was filed in the court of appeals one week later. This suggests that respondent believes the Court's ruling in *Abney* changed the law in the Third Circuit and indicated he was entitled to immediate appellate review at a stage where such review was previously unavailable. This is not so.

Abney involved review of an unpublished decision of the Third Circuit itself, in which that court entertained an appeal and rejected on the merits a challenge to a pretrial order denying a motion to dismiss on Double Jeopardy grounds. See 431 U.S. at 655-656; 530 F.2d 963 (3d Cir. 1976). More important, the law of the circuit had been clearly stated and explained in a published opinion issued two years before *Abney*. *United States* v. *DiSilvio*, 520 F.2d 247, 248 n.2a (3d Cir.), cert. denied, 423 U.S. 1015 (1975). And, as this Court's opinion in *Abney* indicated (431 U.S. at 657), the view endorsed there had already been adopted by the majority of the courts of appeals that had considered the issue by the end of 1976. Thus, if respondent's analogy to the Double Jeopardy Clause is apt, he could have filed a prompt notice of appeal in February 1977 and obtained the immediate review to which he claims to be entitled. He should not now be permitted to use a petition for a writ of mandamus to cure his failure to pursue a timely appeal.[36] In any event, even if the court of appeals could properly take cognizance of

[36] If respondent had erred only by mislabelling his request for relief a petition for mandamus rather than an appeal, full review by the court of appeals at this stage might be appropriate. Respondent also failed, however, to present his claims within the jurisdictional time limit for appellate review. Accordingly, interlocutory review in this case is improper. Particularly since he no longer sits in Congress and his trial will not deprive his constituents of legislative representation for any period, there is little harm in remitting him to his right to appeal any adverse final judgment that may be entered against him.

respondent's request for mandamus relief, that request is without merit for the reasons set forth below.

B. References in the Indictment to Specific Legislative Acts Do Not Render the Charges Against Respondent Invalid.

Notwithstanding respondent's assertions to the contrary (Br. 21-22, 35-43), the indictment in the present case is not materially distinguishable from the indictment sustained in *United States* v. *Brewster*, *supra*. See 78-349 Pet. App. 13a-15a. The *Brewster* indictment charged a Senator with four counts of receiving bribes in return for being influenced in the performance of legislative acts, in violation of 18 U.S.C. 201(c), and one count of receiving a gratuity for and because of the past performance of legislative acts, in violation of 18 U.S.C. 201(g). The indictment specified that the legislative acts to which it referred were Senator Brewster's " 'action, vote, and decision on postage rate legislation' " that might be or had been pending before him in his official capacity. The Section 201(g) count left no doubt that Brewster was charged with receiving a gratuity for completed legislative acts, *i.e.*, a vote and action on legislation that had been pending before him in an earlier session of Congress. See 408 U.S. at 527.

The first four counts of the indictment in the present case (78-546 Pet. App. 1a-6a) charge that respondent solicited and received money, and con-

spired to solicit and receive money,[37] in return for "being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives." The conspiracy count alleges 16 overt acts (*id.* at 2a-4a). Three of these (Nos. 11, 13, and 16) are the introduction of private bills for named individuals on specified dates. A fourth alleged overt act (No. 2) is the introduction of private bills for the clients of a named attorney during a nine-month period. The three substantive bribery counts are based on respondent's alleged solicitation and receipt of money in return for being influenced to introduce private bills for the individuals named in Overt Acts 11, 13, and 16. The substantive counts repeat the allegation in the conspiracy count that respondent did in fact introduce such bills on specified dates (*id.* at 5a, 6a).

Respondent now contends that the indictment is fatally defective because it mentions particular legislative acts. He argues that the indictment in *Brewster* survived scrutiny under the Speech or Debate Clause because it refrained from describing the defendant's "action, vote, and decision on postage rate legislation." The indictment here, by contrast, alleges that respondent introduced private bills for

[37] The final sentence of the conspiracy count in the indictment has been omitted in the reprinting of that count in the appendix to respondent's petition (78-546 Pet. App. 1a-4a). The sentence reads: "All in violation of Title 18, United States Code, Section 371" (C.A. App. 12).

named individuals on specified dates. This, in respondent's view, is impermissible.

Respondent's argument wholly misses the point of the decision in *Brewster*. His misunderstanding is revealed in his repeated inaccurate assertions that "the indictment in this case charges legislative acts" (Br. 36; see also Br. 21-22, 34-35, 36-38, 40-41). The indictment here, like the indictment in *Brewster*, charges the solicitation and receipt of bribes intended to influence the performance of legislative acts. The actual performance of those acts is no part of the offenses charged here, just as it was no part of the offenses charged in *Brewster*. The critical feature of the indictment in *Brewster*, the Court held, was that proof of the material elements of the offenses charged did not require proof of a Congressman's legislative conduct. The Section 201(g) count in *Brewster* plainly charged that the defendant received money for a past legislative act, but the Court ruled that the indictment's reference to a completed act was unobjectionable because inquiry into the legislative performance was not necessary to establish the offense charged. In the Court's words (408 U.S. at 527), "[a]lthough the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation."

Respondent has been indicted for violating the *same statutory provision* that was the basis for four of the five counts against Senator Brewster. The material elements of an offense under Section 201(c)

have not changed since 1972; proof of the offense still does not require proof of any legislative acts. Respondent is simply wrong when he asserts (Br. 41) that in order to prove the charges against him, the government must prove the performance of the legislative acts mentioned in the indictment. Even if the allegations that respondent actually introduced private bills are shown to be false, it would in no sense be fatal to the government's case. To obtain a conviction the government must show that respondent received or agreed to receive money, with the knowledge that it was being paid for the purpose of influencing him in the performance of an official act. No proof of actual performance is required. As the court of appeals correctly concluded (78-349 Pet. App. 15a), "to establish a prima facie case, the government need not show any of the legislative acts for which [respondent] allegedly accepted payments." The first four counts of the indictment therefore do not threaten to impose criminal liability on the basis of legislative acts, and they do not violate the Speech or Debate Clause.[38]

[38] If the Court rejects this argument and agrees with respondent that the indictment should omit mention of particular legislative acts, the appropriate remedy would be not dismissal but redaction along the lines proposed by the district court in its oral ruling on February 1, 1977 (C.A. App. 241-253; see page 8, *supra*). Because proof of respondent's introduction of private immigration bills is not necessary to establish his guilt, the references to specific legislative acts can be stricken from the indictment without difficulty. See *United States* v. *Dowdy*, 479 F.2d 213, 224 (4th Cir.), cert. denied, 414 U.S. 823 (1973). Respondent's performance of a legislative act is not an element of any of the offenses charged, nor must the introduction of particular private bills be mentioned in the indictment in order to describe the way in which one or more elements of an offense were accomplished. The specification of legislative acts is mere surplusage and may be deleted if necessary without denying respondent his Fifth Amendment right to indictment by a grand jury. See *Ford* v. *United States*, 273 U.S. 593, 602 (1927); *United States* v. *Hall*, 536 F.2d 313, 319 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *McCrane*, 527 F.2d 906, 912-913 (3d Cir. 1975), cert. denied, 426 U.S. 906 (1976); *United States* v. *Dawson*, 516 F.2d 796, 800-804 (9th Cir.), cert. denied, 423 U.S. 855 (1975); *United States* v. *Cirami*, 510 F.2d 69, 72 (2d Cir.), cert. denied, 421 U.S. 964 (1975).

C. The Grand Jury's Consideration of Respondent's Legislative Acts Does Not Render the Indictment Invalid.

Respondent contends (Br. 22-24, 49-55) that the first four counts of the indictment must be dismissed because he was questioned before the grand jury concerning his legislative acts and because the grand jury subsequently considered evidence of those acts before deciding to return the indictment for bribery. The district court (78-349 Pet. App. 42a-43a) and the court of appeals (*id.* at 17a-21a) disposed of this argument with little difficulty, and it does not warrant extended discussion here. The Speech or Debate Clause does not forbid the government from inviting a Senator or Representative to testify before a grand jury investigating alleged corruption in connection with certain legislative activity. Nor does the Clause require dismissal of an indictment returned by a grand jury that has considered evidence of a Congressman's legislative acts.

In the first place, the underlying premise of respondent's argument is open to serious question. Since a grand jury proceeding is not an adversarial proceeding to which potential targets are parties, a grand jury inquiry into the legislative acts of a Member of Congress arguably does not entail "questioning" him in violation of the Speech or Debate Clause. Although a Senator or Representative himself cannot be compelled to testify about his conduct in Congress, that does not necessarily imply that a grand jury may not consider evidence of his legislative activity from other sources, such as the testimony of third parties.[39] Of course, a Congressman may not be indicted for legislative acts, and his trial may not involve "questioning" of such acts. But as long as neither of these possibilities occurs and as long as the Congressman himself is not forced to submit to grand jury questioning, the grand jury may well be able to review evidence of legislative acts without offending the Speech or Debate Clause.

Even if this view is flawed, however, and a Member of Congress may assert his privilege to bar the presentation of legislative act evidence to the grand jury, it does not follow that he may attack an indictment on the ground that it is based on evidence

[39] By analogy, if the legislative acts of a Member of Congress were relevant in a civil suit between private parties, the Speech or Debate Clause would not bar judicial consideration of those acts, as long as the necessary evidence could be obtained without questioning the Member himself.

protected by the Speech or Debate Clause.[40] Under this Court's decisions (see pages 100-102, *infra*), if the indictment is valid on its face and has been returned by a competent grand jury, it is sufficient to call for a trial.

Respondent suggests (Br. 49-50) that the United States Attorney violated the Speech or Debate Clause simply by asking him to appear before the grand jury. The suggestion is groundless. When respondent received the request to testify concerning his legislative acts, he was free to refuse and assert his Speech or Debate privilege. He was told repeatedly that he was not obliged to answer questions. He nonetheless chose to testify and cooperate further with the grand jury by producing files of documents regarding the private immigation bills he introduced. He cannot

[40] If a Senator or Representative were free to challenge an indictment on the ground proposed by respondent, virtually every indictment returned against a Member of Congress would prompt a pretrial inquiry into whether the grand jury heard any evidence of legislative acts and, if it did, whether the amount of that evidence and its likely impact on the grand jury's deliberations were sufficient to warrant dismissal of the indictment. This is precisely the kind of pretrial proceeding that the Court's previous decisions have consistently sought to avoid. As the Court stated in *Costello* v. *United States*, 350 U.S. 359, 363 (1956):

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury.

complain now that his own tactical decision in response to the United States Attorney's invitation was barred by the Speech or Debate Clause.

Respondent contends (Br. 49-50, 54), however, that his grand jury testimony was not the product of his free will, because he believed that the grand jury was investigating "third-party crime" and that therefore he was required to testify, under this Court's decision in *Gravel* v. *United States*, *supra*, 408 U.S. at 628-629. As we explain in more detail in Part III (see pages 119-122 and note 54, *infra*), *Gravel* does not restrict a Congressman's Speech or Debate privilege to those situations in which he himself is the defendant or prospective defendant in a criminal proceeding.[41] But even if respondent is correct and he cannot be held responsible for his involuntary production of evidence before the grand jury, he is not entitled to the relief he seeks. Assuming that either as the result of respondent's appearances or because of testimony by other witnesses, the grand jury improperly considered legislative acts protected by the Speech or Debate Clause, dismissal of the indictment is nevertheless not an appropriate remedy.

Costello v. *United States*, 350 U.S. 359, 363 (1956), held that, "if valid on its face," an indictment that

[41] Respondent attributes (Br. 50 n.27) to the government's brief in *Gravel* the argument that Senators and Representatives are not entitled to claim their Speech or Debate Clause privilege when called to testify about their legislative acts in connection with an investigation of criminal activity by others. Respondent's assertion is false. Neither the government's main brief nor its reply brief in *Gravel* contains any such argument.

charges an offense and that is "returned by a legally constituted and unbiased grand jury * * * is enough to call for trial of the charge on the merits." *Costello* sustained an indictment challenged on the ground that it was based exclusively on impermissible hearsay. See also *Holt* v. *United States*, 218 U.S. 245, 247-248 (1910) (upholding indictment despite allegation that it was based on incompetent evidence). Similarly, in *United States* v. *Calandra*, 414 U.S. 338, 344-345, 349-352 (1974), the Court upheld the grand jury's right to consider and ask questions concerning evidence seized in violation of the Fourth Amendment. The Court stated (*id.* at 344-345) that "the validity of an indictment is not affected by the character of the evidence considered."

Respondent attempts to avoid the effect of *Costello* and *Calandra* by arguing that those cases did not involve a situation in which the grand jury's very consideration of certain evidence violated the Constitution. In *Calandra*, the Fourth Amendment violation occurred long before the grand jury's deliberations, and in *Costello*, the disputed testimony was not the product of any constitutional infringement but merely failed to satisfy a court-developed standard for the admissibility of evidence at trial. By contrast, respondent insists, the grand jury's consideration of his legislative acts was itself a violation of the Speech or Debate Clause, because it involved "questioning" of his conduct in Congress.

This contention fails, however, because it ignores the Court's decisions in *Lawn* v. *United States*, 355 U.S. 339, 348-350 (1958), and *United States* v. *Blue*,

384 U.S. 251, 254-255 (1966). Those cases ruled that a grand jury's consideration of evidence obtained in violation of a person's privilege against compulsory self-incrimination will not defeat the validity of a resulting indictment. As the Court repeated in *Calandra, supra*, 414 U.S. at 346, although "the grand jury may not force a witness to answer questions in violation of that constitutional guarantee," "an indictment based on evidence obtained in violation of [the] * * * Fifth Amendment privilege is nevertheless valid."

Similarly here, although the grand jury could not compel respondent to surrender his Speech or Debate Clause privilege and testify concerning his legislative acts, an indictment resulting in part from the grand jury's consideration of respondent's legislative conduct is not subject to attack on the ground that respondent had a right to prevent the grand jury's examination of that evidence. Any possible doubt on the point is eliminated by this Court's decision in *United States* v. *Johnson, supra*, and the subsequent history of that case. The Court permitted a retrial on the conflict-of-interest counts in *Johnson*, even though it was clear from the specification of a legislative act in the original indictment that the grand jury had heard evidence regarding Johnson's congressional speech on the merits of Maryland savings and loan associations. After Johnson's conviction on retrial, the court of appeals rejected the argument that the indictment was invalid because the grand jury had considered evidence of legislative acts. 419

F.2d 56, 58 (4th Cir. 1969). This Court denied certiorari. 397 U.S. 1010 (1970). *Johnson* thus provides strong support for the view that the grand jury's awareness of respondent's practices with respect to the introduction of private immigration bills does not warrant dismissal of the indictment in this case.

D. The Evidentiary Ruling of the Courts Below Does Not Constructively Amend the Indictment.

Respondent argues (Br. 22-23, 43-49) that, by restricting the evidence the government may introduce at trial, the district court and the court of appeals have constructively amended the indictment. As the court of appeals remarked (78-349 Pet. App. 16a), respondent "is not entirely clear on this point." He may be arguing that if the grand jury had not heard evidence referring to his legislative acts, it would not have indicted him, and therefore any conviction resulting from a trial in which that evidence is suppressed cannot stand. This contention is foreclosed by *United States* v. *Calandra, supra*, which holds that a petit jury may return a valid conviction in a trial at which certain evidence is excluded, even if that evidence was the basis for the grand jury's indictment. On the other hand, respondent may be arguing that, by excluding evidence referring to his legislative acts, the courts below have amended the indictment and permitted the petit jury to convict him at trial for offenses not charged by the grand jury. This position is untenable.

Even assuming respondent is correct in thinking that the grand jury would not have voted to indict on the first four counts if it had not known of his introduction of private immigration bills, the evidentiary restriction imposed on the government does not in any way alter the indictment by the grand jury. Our basic position, of course, is that the exclusion of the government's proffered testimony was improper, but if the Court disagrees, there is no reason why the case cannot proceed to trial under the conditions imposed by the district court and the court of appeals. The indictment remains exactly as it was when the grand jury issued it. The elements of the offense that must be proved by the government remain unchanged. The ruling below has simply limited the government's ability to present evidence that might tend to show respondent's performance of a legislative act. And that is a matter of no consequence for respondent's guilt or innocence of the offenses charged. Although the private immigration bills introduced by respondent are mentioned in the indictment, their inclusion is unnecessary and they may be stricken as surplusage without infringing respondent's right to be indicted by a grand jury. See *United States* v. *Brewster*, *supra*, 408 U.S. at 527; see also note 38, *supra*, and cases there cited.

Ex parte Bain, 121 U.S. 1 (1887), and *Stirone* v. *United States*, 361 U.S. 212 (1960), on which respondent relies, do not support his position. *Bain* involved an actual amendment of the indictment that struck language that the Court thought might well

have reflected the grand jury's theory of the case. 121 U.S. at 10.[42] In *Stirone*, the indictment was left undisturbed, but the district court charged the jury on a theory of the case that permitted a verdict of guilty for what the Court viewed as an offense different from that charged by the grand jury.[43] Neither situation is comparable to what occurred in the

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[42] Bain was indicted for making a false report in his capacity as a bank cashier, in violation of Rev. Stat. 5209 (1878). An element of the offense was an intent to injure or defraud the bank or an intent to deceive a bank officer or his agent. The indictment charged, *inter alia*, that Bain intended to deceive the Comptroller of the Currency. The district court struck this allegation, and Bain was convicted. Subsequently, this Court granted habeas corpus relief on the ground that Bain might not have been indicted at all, had not an intent to deceive the Comptroller been one possible way of satisfying the intent requirement of Section 5209. Here, by contrast, proof that respondent performed a legislative act could not possibly establish one of the elements of any offense with which he was charged. Barring such proof from admission at trial therefore could not have constructively amended the indictment.

[43] Stirone was charged with unlawfully interfering with interstate commerce by extortion, in violation of 18 U.S.C. 1951. The indictment alleged that he obstructed the movement of sand from outside Pennsylvania into that State. The district court instructed the jury that it could convict the defendant if it found that he had obstructed the movement of steel from Pennsylvania to other states. This Court held the instruction erroneous because it allowed the jury to return a guilty verdict for conduct not charged by the grand jury.

The evidentiary restriction imposed in the present case creates no such problem. In order to convict respondent, the government still must present evidence that proves the offenses stated in the indictment, not some other possible conspiracy or bribery offense involving respondent.

present case. The critical facts that the government must prove remain unchanged here. The court of appeals and the district court have not forbidden the establishment of an element of an offense on a basis previously available, nor have they invited the jury to convict on a theory not charged in the indictment. Accordingly, the evidentiary ruling now at issue did not constructively amend the indictment.

III.

RESPONDENT WAIVED HIS SPEECH OR DEBATE PRIVILEGE WITH RESPECT TO THE USE OF HIS TESTIMONY AND DOCUMENTS BY THE GRAND JURIES INVESTIGATING PRIVATE IMMIGRATION LEGISLATION AND AT TRIAL ON INDICTMENTS ARISING OUT OF THAT INVESTIGATION

A. Background of the Waiver Issue in This Litigation.

Respondent testified on ten separate occasions before eight grand juries investigating alleged corruption in connection with private immigration legislation. On each occasion, the government advised him of his Fifth Amendment privilege against self-incrimination (C.A. App. 693-702, 708, 888, 984-985, 1150-1151, 1283-1284, 1295, 1334-1335, 1455-1456, 1497-1498). Respondent was told that he was under no obligation to answer questions or produce documents if he believed that to do so might incriminate him. He was also told that any testimony he gave or documents he produced could be used against him later in a court of law. Although, in advising respondent of his rights, the government apparently did not mention the Speech or Debate Clause, there is no doubt

that when respondent made his first grand jury appearance he was aware of the Clause and the legislative privilege it confers. The district court so found (78-349 Pet. App. 48a n.4), and respondent has not contested the finding.[44]

At the start of respondent's testimony during his first grand jury appearance, the United States Attorney reminded him of an earlier discussion in which the government had requested production of all of his documentation concerning any private immigration bills that he had introduced in Congress or that he had asked a colleague to introduce (C.A. App. 696-697). The United States Attorney emphasized that respondent was not required to produce the documents and that any documents he did produce could be used against him (*id.* at 697). The United States Attorney also informed respondent of the nature of the grand jury's inquiry (*id.* at 701). Respondent replied (*id.* at 696, 697, 699):

> Whatever I have will be turned over to you with full cooperation of this Grand Jury and with

[44] Respondent could hardly assert in good faith that he did not know of the privilege when he first appeared before the grand jury. During the two years preceding that first appearance, respondent was a party to a civil suit in which his opponent in the 1972 general election challenged his use of the congressional franking privilege. *Schiaffo* v. *Helstoski*, 350 F. Supp. 1076 (D.N.J. 1972), rev'd in part, aff'd in part, and remanded, 492 F.2d 413 (3d Cir. 1974). Respondent argued that the Speech or Debate Clause precludes judicial inquiry into potential abuse of the franking privilege. 492 F.2d at 417. He was represented in the civil proceeding by the same attorney who represented him throughout his grand jury appearances (78-349 Pet. App. 48a n.4).

> yourself, sir. * * * I promise full cooperation with your office, with the FBI, [and] this Grand Jury. * * * I come with no request for immunity and you can be assured there won't be any plea of the Fifth Amendment under any circumstances.

Subsequently respondent provided the grand jury with the materials now at issue—copies of the private bills he introduced and files of correspondence related to the proposed legislation. He also testified before the grand jury about the congressional procedures for introducing private bills, his reasons for introducing the bills, and his own investigation of allegations that certain Chilean aliens for whom private bills were introduced had paid money to remain in the United States (C.A. App. 829-843, 858-863, 944-962).

As indicated above (see pages 65-67 and note 27, *supra*), some of the letters in the correspondence files produced by respondent probably qualify as legislative acts within this Court's definition of the term. The private bills themselves are clearly legislative acts, and respondent's explanation of his reasons for introducing the bills falls squarely within the area protected by the Speech or Debate Clause. Accordingly, in the absence of a valid waiver of respondent's evidentiary privilege, these materials cannot be used against him in his trial on the bribery charges.

The district court found that "during his various grand jury appearances and in the DeFalco trial [respondent] voluntarily testified in detail regarding his introduction of private immigration bills" (78-

349 Pet. App. 49a). In the court's words, "[t]here can be no question" but that respondent's testimony and production of documents were voluntary. The court also found that, notwithstanding his awareness of the legislative privilege, respondent "[a]t no time * * * asserted any rights under the Speech or Debate Clause" (*ibid.*).[45] The court nevertheless concluded that respondent did not waive his evidentiary privilege. The court distinguished the Speech or Debate Clause privilege first from evidentiary privileges designed to protect confidential relationships and then from the Fifth Amendment privilege against self-incrimination (*id.* at 54a-56a). In view of the purpose of the Speech or Debate Clause "to insulate the independent activities of the legislature from executive and judicial interference" (*id.* at 57a), the court decided that a "stringent" waiver standard should be applied. In the court's view, a valid waiver can be found "only where it has been clearly demonstrated that a legislator has expressly waived his Speech or Debate immunity for the precise purpose for which the Government seeks to use evidence of his legislative acts" (*id.* at 58a).

The court of appeals agreed and adopted the analysis of the district court (78-349 Pet. App. 29a-32a). The court stated that it would permit a finding of waiver only where a Member of Congress "expressly

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[45] This statement is slightly inaccurate. Respondent did invoke the Speech or Debate Clause in response to one question at his penultimate appearance before the grand jury in May 1976. See page 7, *supra;* C.A. App. 1501-1502.

forfeits his protection under the Clause for the purposes for which the Government seeks to use the evidence of his legislative acts" (*id.* at 31a).

B. Under Previous Decisions of this Court Involving Waivers of Constitutional Rights, Respondent's Voluntary Testimony and Production of Documents, Together with his Express Disclaimer of Immunity, Were Sufficient to Waive the Speech or Debate Privilege.

Schneckloth v. *Bustamonte*, 412 U.S. 218, 235-237, 241-246 (1973), teaches that the waiver standard applicable to a particular constitutional guarantee depends on the purpose of that guarantee. The case held that knowledge of one's right to refuse a request for permission to conduct a warrantless search is not a prerequisite for "voluntary" consent. *Bustamonte* establishes that "an essentially free and unconstrained choice," as evaluated in "the totality of the circumstances," is ordinarily enough to waive constitutional protections (*id.* at 225-226). The more demanding requirement of a knowing and intelligent waiver has been applied, almost without exception, "only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial" (*id.* at 237).[46] Recently, in *Garner* v. *United States*, 424 U.S. 648, 657 (1976), the Court referred to the "knowing and intelligent waiver" test as an "extraordinary safeguard," applied in custodial

[46] The stricter standard, requiring "an intentional relinquishment or abandonment of a known right or privilege," was articulated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (collateral review of the denial of counsel in a federal criminal trial).

interrogation situations only because of the high potential for coercion there involved.

The district court in the present case found that respondent testified and produced documents voluntarily, after being informed that any evidence he provided to the grand jury could be used against him in a subsequent proceeding. The court also found that respondent knew of the Speech or Debate Clause privilege but did not attempt to invoke it. Thus, whether waiver of the privilege must be "knowing and intelligent" or only "voluntary," respondent's performance before the grand jury satisfied the test. Unless there is something unusual about the Speech or Debate Clause that requires adherence to an especially high waiver standard, this Court should hold that respondent effectively waived his legislative privilege with respect to the documents he produced and the testimony he gave before the grand jury.[47]

[47] We contend only that respondent waived his privilege in connection with the grand jury proceedings concerning alleged corruption related to private immigration legislation and the subsequent trial on any indictments arising out of those proceedings. The Court need not decide in this case whether respondent's testimony and production of documents can properly be considered a waiver for other purposes as well. Respondent was advised of the nature of the grand jury investigation (C.A. App. 701), and he knew that the grand juries would consider the evidence he provided in determining whether to return indictments for bribery or related offenses. Under these circumstances, it is fair to say that respondent waived his privilege at least with respect to the grand jury investigation, as the subject matter of that investigation was explained to him, and the use of his evidence at trial on indictments arising out of the grand jury proceedings.

C. An Individual Senator or Representative Can Waive the Speech or Debate Privilege.

In opposing the government's waiver argument, respondent and amici first contend (Resp. Br. 63-67; Amici Br. 58-61) that the evidentiary privilege derived from the Speech or Debate Clause is an institutional privilege that cannot be waived by an individual Senator or Representative. After applying the institutional label, however, respondent strongly implies that, in his view, neither Congress as a whole nor a single House can waive the protection of the Clause.[48] Amici make the point explicit (Amici Br. 60-61).

[48] The implication that Congress itself cannot waive the Speech or Debate privilege arises from respondent's persistent attempts to cast his argument in jurisdictional terms. These repeated characterizations of the Speech or Debate Clause as a jurisdictional provision are inaccurate and misleading. The Clause does not adjust the authority vested in the federal courts by Article III of the Constitution and the judicial code. And it does not create an impenetrable wall between Congress and the courts, through which evidence of legislative acts can never pass. Such evidence is plainly admissible in some circumstances; materials gathered in the course of an investigative hearing, for example, may be highly probative of facts at issue in civil litigation. There is no reason to believe that the Speech or Debate Clause deprives courts of "jurisdiction" to receive such evidence.

On the contrary, the legislative privilege, like other privileges, simply means that in some circumstances, for reasons unrelated to the truth-seeking process, it is deemed desirable to keep certain kinds of evidence from the trier of fact. The privilege is an evidentiary rule designed to protect particular values in particular litigation situations. It does not affect the power of courts to adjudicate controversies by considering all relevant evidence properly introduced.

This is an extraordinary position. It means that every time a Senator or Representative testifies about his legislative activity, he violates an inflexible shield provided by the Speech or Debate Clause, ostensibly for his own protection. According to respondent's view, his testimony and production of documents before the grand juries in this very case violated the constitutional provision. The logical outgrowth of the argument that a Member of Congress cannot waive the Speech or Debate privilege is that a person in respondent's position cannot introduce evidence of his legislative activity even if he chooses to do so. In defending himself against the bribery charges in this case, respondent might well wish to inform the jury in detail about his handling of private immigration legislation. If respondent is correct that no waiver is possible, such evidence would presumably be inadmissible.[49] But if the Member of Congress

[49] We say "presumably" because it is not entirely clear in respondent's conception of the privilege who could raise a valid objection to a Congressman's proffer of evidence of his own legislative activity. If the district court truly lacks jurisdiction to consider such evidence, as respondent contends (see note 48, *supra*), then perhaps the government could appropriately object to a Congressman's attempted waiver or the court sua sponte could exclude the proffered evidence. On the other hand, if the Speech or Debate Clause privilege, though not jurisdictional, properly belongs to Congress as an institution, then perhaps only another Member of Congress or some designated representative of a House of Congress could object to a Member's effort to introduce evidence of his legislative acts. In many instances, of course, the practical effect of the latter rule would be the admission of privileged evidence, simply because no one would object to the Member's invalid waiver. The Member would then have the best of

himself decides to place evidence of his legislative acts before the jury, it is difficult to see how admission of that evidence could jeopardize the congressional independence guaranteed by the Speech or Debate Clause. The absolute bar to waiver advocated by respondent and amici is not necessary to achieve the Clause's purpose of insulating the Legislative Branch from outside interference.

Moreover, a prohibition on waiver by an individual Member of Congress is not rooted in the language of the Speech or Debate Clause. The Clause forbids the questioning of Senators and Representatives outside Congress about their legislative activity in Congress. The natural reading of this provision is that Members of Congress are to be free from criminal prosecution, civil suit, and compulsion to testify with regard to their legislative conduct. The Clause thus achieves its goal of protecting legislative independence by guaranteeing the freedom of individual legislators. Nothing in the Clause suggests that, if a Member of Congress voluntarily decides to produce evidence of his legislative acts, a court or grand jury nevertheless cannot consider the testimony or documents offered. It is enough to effectuate the Clause's purpose that a Member of Congress knows he need

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both worlds; he could introduce evidence of protected acts as long as he thought it would help him, but if the tide appeared to turn and the evidence assumed an inculpatory cast, he could assert his nonwaivable privilege and remove the material from the jury's consideration. Such an occurrence cannot have been intended by the Framers of the Speech or Debate Clause.

not comply with any evidentiary demand concerning his congressional behavior.

Although there is little explicit authority on the subject of waiver of the Speech or Debate Clause privilege, the prevailing view appears to be that the privilege is a personal one for the individual Member. See *Gravel* v. *United States*, *supra*, 408 U.S. at 622 n.13 ("an aide's claim of privilege can be repudiated and thus waived by the Senator");[50] *Powell* v. *McCormack*, *supra*, 395 U.S. at 505; *United States* v. *Brewster*, *supra*, 408 U.S. at 547 (Brennan, J., dissenting) ("a personalized legislative privilege"); *In re Grand Jury Proceedings* (*Cianfrani*), 563 F.2d 577, 585 (3d Cir. 1977) ("It is not an institutional privilege belonging to the legislature itself, but rather is personal in nature"); *United States* v. *Craig*, 528 F.2d 773, 780-781 (7th Cir. 1976) (holding that a state legislator subject to federal criminal charges can waive his common law speech or debate immunity by testifying voluntarily before a grand jury), vacated and remanded on other grounds, 537 F.2d 957 (7th Cir. 1976) (en banc) (state legislators enjoy no such common law immunity); *Coffin* v. *Coffin*, *supra*, 4 Mass. at 27 ("the

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[50] Respondent argues (Br. 63-65) that this footnote in *Gravel* merely means that the Congressman, rather than the aide, must determine whether to waive the privilege available to the aide. But if this is the point of the footnote, then it was superfluous, for the discussion in the text preceding the footnote makes clear that the privilege is the Senator's, not the aide's. See 408 U.S. at 621-622. The footnote therefore must mean that the Senator may waive the privilege for himself as well as for his aide.

privilege secured by [the speech or debate provision in a state constitution] is not so much the privilege of the house, as an organized body, as of each individual member composing it"). But see T. Jefferson, *Manual of Parliamentary Practice*, reprinted in *Barclay's Constitutional Manual and Digest* 58 (1865). The widespread assumption that a Congressman can waive his Speech or Debate Clause privilege reflects the general understanding that the constitutional provision preserves legislative independence by insulating individual legislators from harassment by the Executive and Judicial Branches. If a Senator or Representative voluntarily cooperates with a criminal investigation or participates in a civil case, there is no reason to deny the criminal justice system the fruits of that cooperation solely on the ground that a privilege that the Congressman felt no need to assert cannot be waived.[51]

D. In View of Respondent's Undisputed Awareness of the Speech or Debate Clause and His Explicit Eschewal of Any Request for Immunity, His Voluntary Testimony and Production of Documents Were Sufficient to Waive His Evidentiary Privilege.

Respondent voluntarily testified and produced documents before the grand juries. He did so with an

[51] Under petitioner's view, he would have been incapacitated to appear as a defense witness in the prosecution of DeFalco and to testify there regarding his legislative actions. While the Clause would preclude the compulsion of such testimony over objection by the Congressman, we find it inconceivable that a Congressman could not agree to provide evidence in such a case.

awareness of his Speech or Debate Clause privilege. His cooperation was not the product of coercion but rather was intended to procure a tactical advantage by demonstrating to the grand juries that he had nothing to hide. The same tactical choice also explains respondent's bravado announcement at his first grand jury appearance (C.A. App. 699): "I come with no request for immunity and you can be assured there won't be any plea of the Fifth Amendment under any circumstances." Respondent's conduct was adequate to constitute a waiver of his evidentiary privilege under either a "voluntary" or a "knowing and intelligent" standard. Indeed, he does not argue otherwise.

He does contend, however, that a test even stricter than the "knowing and intelligent" standard should be applied in determining whether a Member of Congress has waived his evidentiary privilege. Without describing what is in his view the appropriate test, respondent asserts (Br. 68) that "plainly such a waiver could not be found on the facts of this case." The courts below agreed and held that a valid waiver can be found only if a Member of Congress "expressly forfeits his protection under the Clause for the purposes for which the Government seeks to use the evidence of his legislative acts" (78-349 Pet. App. 31a).

This extraordinary standard, not satisfied even by "an intentional relinquishment or abandonment of a known right or privilege" (*Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)), would effectively preclude valid waivers of the legislative privilege. And it

would do so without any apparent gain for the purposes served by the Speech or Debate Clause. Respondent could have asserted his privilege when the United States Attorney asked him to testify and produce documents concerning the introduction of private immigration bills. Had he done so, he would have avoided distraction from his legislative duties, prevented inquiry into his legislative acts, and reaffirmed his independence from the Executive and Judicial Branches. But respondent deliberately chose not to do so and instead to cooperate with the grand jury's investigation. To permit him now to bar judicial consideration of his testimony and the documents he produced will not contribute to his or any other Congressman's independence. It will merely allow him to avoid the negative effects of his failed strategy to influence the grand jury.

The district court thought a strict waiver standard was necessary for two reasons,[52] both of which respondent now embraces (Br. 68-69). First, the court feared that adoption of some lesser standard such as voluntariness would "force a legislator, in order to preserve his privilege, to refrain from reference to his legislative acts when outside the House" (78-349 Pet. App. 56a). This concern, perhaps prompted by some imprecision in the government's argument below, dissolves when one recalls the dif-

[52] The court of appeals, in affirming the district court's decision, treated the waiver issue in less detail and did not specifically repeat the district court's reasoning (78-349 Pet. App. 29a-32a).

ferences between respondent's production of evidence before the grand juries and the ordinary "dissemination of information about a member's legislative conduct" that the district court sought to protect. We do not contend here that the Speech or Debate privilege is waived whenever a Senator or Representative refers to a legislative act in campaign speaking or casual conversation outside Congress. We argue only that a valid waiver can be found in respondent's production of evidence before the grand juries in this case, after respondent was informed of the nature and purpose of the grand jury investigation and after he was told that he was not required to testify and produce documents, but that if he did, the materials could be used against him in subsequent court proceedings. Recognizing a waiver under these circumstances would not inhibit a Congressman's ordinary communications with constituents and others concerning his past legislative performance. The problem with the waiver standard adopted by the courts below is that it would not permit a finding of waiver even where a Senator or Representative does know the purpose of a particular investigation and deliberately fails to claim the privilege.

The district court's second justification for adoping a stringent waiver test is more difficult to explain. The court's reasoning is based on a misunderstanding of the holding in *Gravel* v. *United States*, *supra*, 408 U.S. at 628-629. In the court's view (78-349 Pet. App. 57a), *Gravel* held that "while a legislator has Speech or Debate rights when his acts are called into question, he has no such rights when called to

testify concerning third-party crime." From this the district court concluded that there can be no valid waiver of the Speech or Debate privilege unless the Senator or Representative knows the precise purpose for which the government wishes to use evidence of his legislative acts. The court reasoned that in the absence of notice of the government's purpose, a Congressman might think that his acts were not in question and therefore that he could not claim any privilege under the Speech or Debate Clause. Respondent perpetuates the district court's misreading of *Gravel* when he argues (Br. 68) that a prerequisite to a valid waiver of his evidentiary privilege before the grand jury was a warning that he was a target of the government's investigation. Without such a warning, respondent contends (*ibid.*), "he had every right to believe that the investigation concerned third-party crimes as to which the Speech or Debate Clause would be inapplicable."

Respondent and the district court are mistaken in their assumption that *Gravel* created different classes of rights under the Speech or Debate Clause, depending on whether a particular law enforcement inquiry focused on a Senator or Representative's conduct or the conduct of some third party. On the contrary, regardless of the purpose of a given investigation, Congressmen retain an unvarying privilege not to be questioned about their legislative acts.[53] *Gravel* holds

[53] This is similar to the settled proposition that the privilege against compelled self-incrimination is not restricted to testimony in a proceeding directed against the person asserting

only that, although Congressmen are immune from questioning about their legislative acts, they are not immune from questioning about information they obtained in the course of preparation for legislative acts. Of course, in some circumstances, the preparation for a legislative act might itself be a legislative act, *e.g.*, research and consultation in preparation for the drafting of a bill. In such a situation, *Gravel* would not permit questioning about either the preparation or the later act. In other circumstances, however, preparation for future legislative acts may not itself qualify as a legislative act, *e.g.*, a Congressman's enrollment and attendance in a law school course on federal jurisdiction. In such cases, *Gravel* teaches, the Congressman may be questioned about information obtained in preparation for legislative acts, and he may be so questioned whether he himself or some third party is the subject of inquiry.

In short, there is simply no support for respondent's contention that his ability to assert a Speech or Debate privilege depended on the identity of the persons under investigation by the grand jury.[54] His privilege was identical, whether or not he was a grand jury target. Notwithstanding the district

the privilege, but is equally available to one called as a witness in a case to which he is not a party. See 8 *Wigmore on Evidence* § 2270, at 414 (J. McNaughton rev. 1961).

[54] Assuming that respondent entertained a good-faith misunderstanding of *Gravel*, his proper course would have been to assert his legislative privilege and then to see whether the government objected on the ground that he was not a grand jury target. After his voluntary testimony and production

court's opinion, *Gravel* affords no basis for imposing a uniquely demanding waiver standard under the Speech or Debate Clause.

E. Even if Respondent's Testimony and Production of Documents Do Not Constitute a Waiver with Respect to the Use at Trial of the Evidence Thus Obtained, They Do Foreclose Any Objection to the Grand Jury's Consideration of that Evidence.

Because respondent was advised of the nature of the grand jury's investigation and was clearly and repeatedly informed that any testimony he gave or documents he produced before the grand juries could be used against him in later court proceedings, we have argued that respondent waived his evidentiary privilege with respect to this material, in connection with both its use by the grand juries and its later introduction at trial. If the Court should reject this argument and hold that respondent retains the right to assert the privilege at his trial on the bribery charges, it should nevertheless rule that his disclosures before the grand juries constituted a valid waiver with respect to the ongoing grand jury investigation. At the very least, the Court should hold that respondent is now estopped from complaining about the grand jury's consideration of his legisla-

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of documents, combined with the district court's express finding that he was aware of the Speech or Debate Clause, respondent should not be heard to contend that he thought he could not claim any privilege. Respondent's argument is further discredited by the fact that he did assert the privilege on one occasion in his penultimate grand jury appearance (C.A. App. 1501-1052).

tive acts, because he himself is responsible for allowing the grand jury to see the private bills and his correspondence files. Even if respondent, acting alone, could not waive the Speech or Debate privilege, or even if the court of appeals' strict waiver standard is appropriate, respondent should still not be permitted to benefit now by attacking his indictment on the ground that the grand jury wrongly reviewed materials that he voluntarily provided.[55]

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[55] Respondent makes much of the fact that he did not testify or produce documents before the grand jury that actually indicted him. Respondent was unquestionably aware, however, of the grand jury procedure employed by the United States Attorney, a procedure involving the use of several different grand juries, all in session during the same period of time and each meeting once a week (see 78-546 Pet. App. 9a-14a). This procedure explains why respondent testified before eight grand juries instead of only one. Respondent now suggests that, although he may have waived his Speech or Debate privilege with respect to the use of his testimony and documents by the grand juries before which he appeared, he executed no such waiver in connection with the ninth grand jury, the one that actually indicted him. This contention ignores the reality of the situation as respondent knew it at the time. As he appeared before the successive grand juries, respondent was aware that each grand jury was familiar with some or all of the testimony he gave and documents he produced before the earlier grand juries. He also knew that the subject matter of each grand jury's investigation was identical—alleged corruption in connection with private immigration legislation. In this situation, there is no basis for respondent's argument that any waiver he may have made was limited to the grand juries before which he appeared and did not extend to the continuing grand jury investigation.

CONCLUSION

The judgment of the court of appeals in No. 78-349 should be reversed. The judgment of the court of appeals in No. 78-546 should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-349

UNITED STATES OF AMERICA,
Petitioner,

v.

HENRY HELSTOSKI,
Respondent.

No. 78-546

HENRY HELSTOSKI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

HONORABLE H. CURTIS MEANOR,
Nominal Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR HENRY HELSTOSKI
Respondent in No. 78-349; Petitioner in No. 78-546

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BRIEF FOR HENRY HELSTOSKI

Respondent in No. 78-349; Petitioner in No. 78-546

Preliminary Statement

On June 2, 1976, a grand jury for the United States District Court for the District of New Jersey returned an indictment in which then Congressman Helstoski was a named defendant. The charging language of the indictment in Count I, after reciting Mr. Helstoski's status as a Congressman, says:

> "[Congressman Helstoski with others] did conspire . . . to violate . . . Title 18, U.S.C. § 201(c)(1) by . . . corruptly asking . . . receiving and agreeing to receive money . . . in return for . . . being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives."

The overt acts charged include:

> "2. From in or about August of 1967 to in or about May of 1968, the defendant, Henry Helstoski, introduced private bills in the United States House of Representatives for clients of Vincent J. Agresti.
>
> "11. On or about October 13 1972, the defendant, Henry Helstoski, introduced private bills in the United States House of Representatives for Osvaldo Aguirre, Patrice Bergeoing, Raul Rojas, Hernan Molina and Alejandro Gonzalez and other members of their families.
>
> "13. On or about September 6, 1973, the defendant, Henry Helstoski, introduced a private bill in the United States House of Representatives for Luis and Maria Echavarria.
>
> "16. On or about January 27, 1975, the defendant, Henry Helstoski, introduced a private bill in the United States House of Representatives for Luis and Maria Echavarria."

Count II, after reciting Mr. Helstoski's status as a Congressman, charges that he

> "corruptly asked . . . and agreed to receive cash payments from each of [five named persons] . . . in return for . . . being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives on [their behalf] . . . and thereafter on or about October 6, 1972 . . . corruptly accepted and received as a bribe [moneys] in return for [his] being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives on [their behalf] . . . which private bills were introduced by the defendant, Henry Helstoski, on October 13, 1972."

Except for differences in dates, persons, and amounts allegedly received, Counts III and IV track Count II precisely. Count III concludes with the charge that a "private bill was introduced [on behalf of two persons] on September 6, 1973." Count IV concludes with a charge that another bill was introduced on behalf of the same individuals on January 27, 1975.[1]

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[1] The full text of Counts I through IV appears in the appendix to the petition for certiorari in No. 78-546, 1a.

Other counts of the indictment included charges of alleged perjury and obstruction of justice unrelated to the issues now before the Court. None of the counts of the indictment has been tried. Some of these other counts of the indictment included charges against members of Mr. Helstoski's staff along with charges against him, but the former Congressman is the only person named as a defendant in the first four counts of the indictment. All counts in which persons other than Mr. Helstoski were included as defendants were severed from those in which he was the sole defendant.

Before trial Mr. Helstoski moved to dismiss Counts I through IV as offensive to the Speech or Debate Clause, claiming that the indictment was beyond the jurisdiction of the district court in that "these counts are founded upon and allege legislative acts, contrary to the provisions of Article 1, Section 6 of the Constitution of the United States." The District Court denied this motion but held that at trial, "the Government may not, during its case-in-chief . . . introduce evidence . . . of the past performance of a legislative act by defendant." Pet., No. 78-349, 62a.

Trial was deferred while the government pursued an interlocutory appeal from this ruling. During the pendency of that appeal, Mr. Helstoski, by petition for a writ of mandamus/prohibition, sought review of the jurisdictional aspects of the District Court's ruling. The Third Circuit affirmed the evidentiary holding of the District Court but denied the petition.

Separate petitions for certiorari were presented. No. 78-349 is the government's petition seeking review of the evidentiary ruling below. No. 78-546 is Mr. Helstoski's petition questioning the jurisdiction of the grand jury to return, and the District Court to try, an indictment which on its face calls into question the conduct and motives of a Member of Congress in introducing a bill. Mr. Helstoski's petition also questions the power of the District Court to constructively amend the indictment by permitting the trial to proceed with the Speech or Debate Clause being enforced by forbidding the government to prove the legislative acts charged by the grand jury.

From the beginning, the jurisdictional and evidentiary aspects of the Speech or Debate Clause issue have been dealt with together. They were decided in one opinion by the District Court. Pet. No. 78-349 at 2a. In the Third

Circuit, the government's interlocutory appeal and the defendant's petition were consolidated and decided in a single opinion. *Id.* at 38a.

By agreement of counsel, Mr. Helstoski is filing the opening brief, which deals first with the jurisdictional issues presented in No. 78-546. This brief will also address the evidentiary issues in No. 78-349, to the extent that they have been presented preliminarily by the government in its petition for certiorari.

Opinions Below

The opinion of the Court of Appeals is reported at 576 F.2d 511. The opinion of the District Court is not reported. These opinions are reprinted in the appendix filed with the government's petition in No. 78-349 at 2a and 38a, respectively.

Jurisdiction

As to No. 78-546

The judgment of the Court of Appeals (Pet. No. 78-546, 7a) was entered on April 13, 1978. The order of the Court of Appeals denying a petition for rehearing was entered on June 30. *Id.* at 8a. On September 29, 1978, Mr. Justice Brennan extended the time within which to file a petition for certiorari to and including October 3. The petition was filed on September 29 and granted on December 11, 1978.

The jurisdiction of this Court rests on 28 U.S.C., §1254 (1).

As to No. 78-349

The judgment of the Court of Appeals (Pet. No. 78-349, 34a-35a) was entered on April 13, 1978. The order of the Court of Appeals denying the government's petition for rehearing was entered on June 30. On July 25, Mr. Justice Brennan extended the time within which to file a petition for certiorari to and including August 29. The petition was filed on that day and granted on December 11, 1978.

The juirsdiction of this Court rests on 28 U.S.C., §1254 (1).

Questions Presented

In No. 78-546

1. Does the United States District Court have jurisdiction to try petitioner on an indictment which on its face charges that as a Member of the Congress of the United States he performed certain specific and identified legislative acts, to wit: the introduction of bills in Congress, with corrupt motivation? Under the Speech or Debate Clause, does not Congress have exclusive jurisdiction to inquire into its Members' performance of legislative acts?

2. May an indictment offensive to the Speech or Debate Clause, both on its face and in the means by which it was procured, nevertheless be prosecuted by forbidding proof at trial of the legislative acts specified in the indictment? Would not such a trial procedure amount to both an impermissible manipulation of the Speech or Debate Clause and a constructive amendment of the indictment, in violation of the Fifth Amendment right to be tried only upon the indictment voted by a grand jury?

3. May the above-described indictment of a Congressman, having been procured by calling into question before a grand jury the legislative acts of that Congressman, nevertheless proceed to trial?

In No. 78-349

(as stated by the government in its petition)

1. Whether the Speech or Debate Clause bars the government from introducing, in the bribery trial of a former Congressman, any evidence that, although not a legislative act, refers to the defendant's past performance of a legislative act.

2. Whether the voluntary giving of testimony and production of documents before a grand jury by a Congressman who is aware of but does not invoke the Speech or Debate Clause privilege constitutes a waiver of that privilege with respect to use of those documents and that testimony at the trial of an indictment returned by the grand jury, when there has been no express authorization by the Congressman of such use.

Constitutional and Statutory Provisions Involved

Article I, Section 6 of the Constitution provides, in pertinent part:

> ". . . for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."

Article I, Section 5 of the Constitution provides, in pertinent part:

> "Each House may . . . punish its Members for disorderly Behaviour . . ."

The Fifth Amendment to the Constitution provides, in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present-

ment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . ."

Title 18, U.S.C., §201 provides, in pertinent part:

"(a) For the purpose of this section: 'public official' means Member of Congress . . .; 'official act' means any decision or action on any . . . matter . . . which may by law be brought before any public official, in his official capacity, or in his place of trust or profit. . . .

"(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

"(1) being influenced in his performance of any official act . . . [shall be guilty of an offense]. . . .

"(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . . [shall be guilty of an offense]."

Statement

From 1965 through 1976, for six terms, Henry Helstoski was a Member of the House of Representatives, representing the Ninth Congressional District of New Jersey. He was defeated in the general election of 1976.

Mr. Helstoski's district included areas in Bergen and Hudson Counties populated by a range of ethnic groups, including many relatively recent immigrants to the United States. Problems under the immigration laws are commonplace in such districts, and Mr. Helstoski and his staff gave constituents assistance in the resolution of those problems. From time to time Mr. Helstoski, like many other Members of Congress, especially those from multiethnic districts, introduced bills in Congress to suspend the operation of the immigration laws as to particular individuals. Such bills are generally referred to as private immigration bills.[2] Private legislation constituted a small percentage of former Congressman Helstoski's legislative activities.[3] A particularly active legislator, he sponsored

[2] Any such bill, upon being introduced, is referred to the Subcommittee on Immigration of the House Judiciary Committee. The Immigration and Naturalization Service of the Department of Justice, and the Department of State, render reports on each proposed bill for incorporation into the committee's file on the intended beneficiary. In due course the subcommittee and in turn the committee make recommendations to the House. For each session of Congress the committee prepares a House document which includes a schedule of all bills introduced by all Members and its recommendation as to each. A similar procedure is employed in the Senate.

[3] During his 12 years in Congress, Mr. Helstoski introduced 178 private bills, of which 23 were introduced at the request of other Members (*e.g.*, his predecessor in office, Members from other districts who had constituents interested in a person residing in the Ninth District, etc.).

much legislation and held important committee assignments.[4] He had a staff of 18 persons, under budgetary allocations of the House, many of whom were designated "case workers" assigned to constituent services, effectively mediating between private individuals and the federal bureaucracy.

In the Fall of 1973, Mr. Helstoski heard rumors of corruption centering on a former aide[5] who allegedly had participated in the taking of moneys from Chilean aliens to influence Mr. Helstoski's introduction of private immigration bills. Upon hearing the rumors, Mr. Helstoski promptly called the Chileans into his office and, after listening to their accounts, directed them to the F.B.I. See, unpublished opinion of the District Court, February 24, 1977 (Pet. No. 78-546, 20a). The Chileans did in fact go to the FBI, which initiated an investigation of the matter.

The grand jury proceedings herein, so far as Mr. Helstoski knows, commenced in April, 1974. At that time, it appeared that Albert DeFalco, the one-time aide, was the target. In fact, Mr. DeFalco and some others never associated with the Congressman were indicted in May, 1975. Standing trial alone, Mr. DeFalco was convicted in November of that year of falsely claiming, in violation

[4] Mr. Helstoski sponsored or co-sponsored more than 2,500 other pieces of legislation. His committees during his 12-year service included Ways and Means, Interstate and Foreign Commerce, Government Operations, Merchant Marine and Fisheries, Veterans' Affairs, Science and Astronautics. He had been chairman, for three years, of the Subcommittee on Education and Training of the Committee on Veterans' Affairs.

[5] Albert DeFalco had been employed by Congressman Helstoski as a legislative aide some time in 1967 and 1968. Since then he had not been employed by Mr. Helstoski except as a campaign aide during one election campaign.

of 18 U.S.C. § 912, that he was an aide to Mr. Helstoski, and of conspiring to do so.[6] That conviction was bottomed upon testimony that one Ronald Blackwell, a factory manager, had taken money from some of his alien employees and their friends, whom he had introduced to Mr. DeFalco. The latter in turn recommended the aliens to the Congressman as beneficiaries of private legislation. The theory of that prosecution was that the aliens paid Mr. Blackwell in reliance upon Mr. DeFalco's false claim to be a secretary to Mr. Helstoski and that Mr. DeFalco shared in the proceeds.[7] At the time of the *DeFalco* trial the government made no charge that Mr. Helstoski was involved in the conspiracy of which Blackwell pleaded guilty and DeFalco was convicted after trial. In fact, the prosecution insisted at the *DeFalco* trial that the defendant acted without any authority to speak on behalf of Mr. Hel-

[6] The statement in the government's petition in No. 78-546 that "De Falco was convicted of *bribery* charges in connection with private immigration legislation" (n. 2, p. 4; emphasis added) is simply not true. The charges against him were conspiracy to impersonate falsely under 18 U.S.C. § 912, and substantive offenses under the same statute. See indictment in *United States* v. *DeFalco, et al.*, Cr. No. 75-264, United States District Court for the District of New Jersey, reprinted in appendix to petition for certiorari *sub nom. DeFalco* v. *United States*, No. 77-6872, 17a.

[7] Mr. DeFalco was also convicted of false impersonation in order to take money from an Argentinian couple, the Echavarrias. His conviction on that count has since been vacated and the count dismissed upon proof that the government had withheld exculpatory evidence, *United States* v. *DeFalco*, Cr. No. 75-264, United States District Court for the District of New Jersey, unpublished opinion of Judge Lacey, 8/8/77, reprinted in appendix to petition for certiorari, *supra*, note 6.

stoski and that he fraudulently represented himself as the Congressman's administrative secretary or aide.[8]

Reversing course, the government now charges that the Congressman and Mr. DeFalco were in conspiracy with each other with respect to the very same transactions that were at issue in the *DeFalco* case.

Though he appeared before grand juries ten times, Mr. Helstoski never appeared before the grand jury which indicted him. This reflects the peculiar and perhaps unique[9] manner in which the U.S. Attorney for New Jersey structured the grand jury proceedings. Eight grand juries heard testimony and received documents. Portions of that evidence were then selected and read to a ninth grand jury—the indicting grand jury—which also received some additional material. No legislative materials were given by Mr. Helstoski to the indicting grand jury. It never even saw him.

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[8] In its opening at the *DeFalco* trial, the government said:

> "It was Mr. DeFalco who pretended . . . although it was not true . . . that he was at the time he was dealing with these aliens still the administrative aide to Congressman Helstoski. . . . We will prove to you, of course, that he was not at that time the administrative aide or secretary to Congressman Helstoski . . . and that *at no time was he authorized to speak on . . . [Helstoski's] behalf.*"

United States v. *Albert DeFalco, supra,* Tr., 10/6/75, p. 41 (emphasis supplied).

Indeed, in the course of the *DeFalco* trial, overt act allegations as to the introduction of private bills were stricken (Tr., *DeFalco* trial, 10/14/75, pp. 904-906) precisely because the Congressman was not charged with being a participant in that conspiracy.

[9] See opinion of Judge Meanor (Pet. #78-546, 15a).

All of these proceedings before the ninth grand jury took place during five sessions held over the course of two weeks (May 19-June 2, 1976) in which testimony from more than two years of investigation by other grand juries was presented. Mr. Helstoski's responses to inquiries by the earlier grand juries were included in the materials submitted by the prosecutor to the indicting grand jury. Also included was evidence of the Congressman's legislative acts. Moreover, as Judge Meanor specifically found, significant exculpatory material was culled out (Pet. No. 78-546, 19a-22a). The process culminated when the ninth grand jury returned an indictment just one week before the 1976 primary election.[10] Pet. No. 78-546, 13a.

The grand jury proceedings continued for over two years between April, 1974, and May, 1976. During that time Mr. Helstoski appeared ten times before eight different grand juries. At the request of the government and/or pursuant to subpoena, he submitted to the grand juries various materials, including copies of bills and correspondence relating to bills. He testified about the procedure by which he introduced bills in the House and he detailed how his office dealt with private bill requests. He also testified about his own investigation into allegations of payments surrounding the Chileans' bills.

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[10] Mr. Helstoski has not been given an opportunity to inspect all the grand jury proceedings. But on ascertaining that an unusual procedure involving multiple grand juries had been employed by the U.S. Attorney, he made a motion to dismiss the indictment on that account. In the course of passing upon the motion to dismiss on those considerations, the District Court examined the file of all grand jury proceedings. Its opinion (Pet. #78-546, 9a-22a) discloses the facts as to how multiple grand juries were employed in this case. Questions as to the propriety of the use of multiple grand juries in the manner described by the District Court are not currently before this Court in the pending petitions.

M. Helstoski on each appearance before the grand jury was told that he was not required to testify or produce documents that might incriminate him. See opinion of the Court of Appeals (Pet. No. 78-349, 6a). But at no time did the government seek a waiver of any rights or privileges he may have had under the Speech or Debate Clause. *Ibid.*

At no time during all the grand jury proceedings was Mr. Helstoski ever notified that he was a target of the investigation.[11] Indeed, when on May 7, 1976, he inquired whether he was a target, he was informed that the question was "inappropriate." Tr., grand jury proceedings, May 7, 1976, p. 13, C.A. App., 1501.[12]

From and after the government's refusal to state whether he was a target, Mr. Helstoski submitted to the grand jury no material by way of bills or correspondence relating to bills. Neither did he offer any testimony with respect thereto.

Mr. Helstoski has at all times vigorously denied the receipt of moneys for the doing of any legislative act. Indeed, he insists that the government, by reason of its own intensive investigation of virtually all of his constituent-service activities during his six terms in Congress, is fully aware that he assisted thousands of his constituents by numerous acts, without a suggestion or hint of

[11] As explained by Judge Meanor in his unpublished opinion (Pet. #78-546, 20a), there was no question that the government was investigating the "purchase [of] private immigration bills from a 'connection' with the House of Representatives." But the suggestion that it was the Congressman, rather than his former aide, who was the "connection" was never advanced to Mr. Helstoski.

[12] "C. A. App." designates a five-volume appendix filed by the government in the Court of Appeals.

corruption, and that he himself instigated the investigation when he heard rumors of payments by supplicants for private bills. In the face of an impressive and impeccable record, the U.S. Attorney is staking his case on two or three witnesses, each of whom is beholden to the prosecutor because of deep involvement in illegal activities[13] and has contrived testimony which is contradicted both by objective facts and by Mr. Helstoski's unblemished record. The testimony was designed, however, to satisfy the U.S. Attorney's ill-concealed desire to put an end to

[13] Because the government requested the District Court to give advance rulings as to the admissibility of certain proposed testimony (*infra*, p. 17), the defense in this case has been favored with a preview of the government's anticipated trial presentation far more complete than it normally receives in a federal criminal trial with limited discovery.

Without reviewing the case in all of its details, it is plain that the Echavarrias, mentioned in Counts III and IV, are to be among the mainstays of this case. They were on their way to being deported because of the failure of private legislation introduced on their behalf. However, on their agreement to testify against the former Congressman, the then U.S. Attorney arranged that they be permitted to stay in the country, despite the fact that he knew, from evidence before one of the non-indicting grand juries, that the couple had engaged in "criminal conduct" by way of a fraudulent statement of a business investment "in their quest to obtain permanent residence;" opinion of Judge Meanor, Pet. No. 78-546, 22a. Thus, the Echavarrias were "trading up," the process described by the press in the *Garmatz* case, *infra*, n. 15. The two other witnesses mentioned by the government in its proposed testimony made comparable arrangements for either no prosecution at all or light sentences. By contrast, Mr. DeFalco, who not only has asserted his innocence but has insisted that the Congressman knew nothing of moneys being passed for legislation, received a six-year sentence. Indeed, Mr. DeFalco unsuccessfully sought to discharge his assigned trial counsel, a former Assistant U.S. Attorney, complaining that "They want me to perjure myself to get off the hook." Tr., *United States* v. *DeFalco*, October 6, 1975, *supra* note 6 p. 3.

Mr. Helstoski's career in Congress,[14] which is also evidenced by timing this indictment to have maximum political effect. The word of such witnesses was made credible to the grand jury by the deliberate exclusion of significant exculpatory evidence.[15]

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[14] In separate litigation which is still pending, the Third Circuit sustained the right of Mr. Helstoski to sue the former U.S. Attorney on his claim that the prosecutor had engaged in a massive program of leaks to the press during the grand jury investigation for the purpose of discrediting the then Congressman. *Helstoski* v. *Goldstein*, 552 F. 2d 564 (3d Cir., 1977).

Irresponsible smearing of the former Congressman's name is evident even in papers presented to this Court. At page four of the government's petition we read that grand jury investigations "inquiring into corruption in connection with private immigration legislation . . . continued for a number of years and have resulted in several indictments and convictions, including those of respondent's former administrative assistant *and his brother*" (emphasis supplied). While the government accurately cites the opinion of the Third Circuit for this contention, the government is fully aware of the inaccuracy of that statement. The former Congressman's brother was convicted of filing false income tax returns on behalf of a construction company of which he was an officer. In no way was any matter relating to any immigration bills involved in that prosecution, nor was the Congressman in any way involved in the construction company.

[15] The U.S. Attorney's office in Newark has previously demonstrated its penchant for indicting Congressmen on flimsy and unreliable evidence. It reached out to Baltimore and undertook in the federal court of that city the prosecution of then retired Congressman Garmatz. That prosecution was ultimately dismissed at the request of the government when diligent investigative efforts by defense counsel unearthed indisputable evidence that the government's main witness had contrived a story implicating the Congressman in order to cover his own criminality, a technique dubbed "trading up" by prosecutors. *Washington Post*, January 10, 1978, p. 1. While the U.S. Attorney's office in Newark announced it would investigate the government witness (*Newark Star-Ledger*, January 10, 1978), no indictment has to this date been announced.

Proceedings Before the District Court

Before trial, and on or about January 10, 1977, Mr. Helstoski made a motion to dismiss the first four counts of the indictment as being offensive to the Speech or Debate Clause of the Constitution. At a pretrial *in camera* conference on February 1, 1977, the District Court rendered an oral opinion denying the motion to dismiss but holding that the Speech or Debate Clause prohibited the government from proving during its case-in-chief the performance by Mr. Helstoski of any legislative act.

Following the court's *in camera* ruling of February 1, the government moved to postpone the trial, which had been scheduled to commence on February 15, in order to pursue an interlocutory appeal pursuant to 18 U.S.C. § 3731. Accordingly, the District Court, which had hitherto withheld its opinion and order on defendant's motion to dismiss in order to avoid pretrial publicity, filed them on February 22 and February 23, respectively. The opinion, which reiterated what the court had said *in camera*, is set forth in the appendix to the government's petition in No. 78-349, at 38a.

The District Court noted the government's concessions that the private immigration bills constituted legislative acts and that Mr. Helstoski's subsequent defeat in the general election had no effect upon his assertion of the Speech or Debate Clause; Pet. No. 78-349, 47a. The court declined to dismiss the indictment, believing that the allegations of legislative acts in the indictment were "not essential." *Ibid.* It declined to consider the implications of the grand jury's having heard extensive testimony of legislative acts, stating that it would not go behind the face of the indictment. Turning to the government's wish to prove the legislative acts and the motives or intent of Congressman Helstoski, the court concluded that such proof

was barred by *United States* v. *Johnson*, 383 U.S. 169 (1966), and *United States* v. *Brewster*, 408 U.S. 501 (1972).

Without deciding whether the Speech or Debate Clause created a personal privilege waivable by an individual Member of Congress, the court rejected the government's argument that the privilege had been waived by Mr. Helstoski's appearance before the grand juries or by his making statements or writing letters in which he described legislative acts performed by him. The Court ruled that in light of the purpose of the Speech or Debate Clause any waiver would have to be express and that such a waiver clearly did not exist in this case.

Proceedings in the Court of Appeals

The Court of Appeals appears to have decided in favor of the government on questions as to the validity of the indictment, though it is unclear whether its determination was based upon the merits of the issue or because the issue was presented to it via the procedural route of mandamus. In its introductory discussion it emphasized that Mr. Helstoski was required to show that "he had no other adequate means to attain the relief he seeks" and "the issuance of the writ is in large part a matter of discretion." Pet. No. 78-349, 12a. On the aspect of Mr. Helstosk's mandamus petition claiming that the grand jury had "questioned" his acts in violation of the Speech or Debate Clause, the Circuit Court clearly deferred its ruling. It said:

> "Any argument that the important policies underlying the Clause require dismissal of an indictment returned by a grand jury that heard evidence in violation of the Clause's principles does not go to the jurisdiction of the district court, but to the proper means that this Court should use to effectuate the Clause. As such, we believe it is an argument better left for decision on appeal from a final judgment." Pet. No. 78-349, 20a.

On the evidentiary issue the Court of Appeals affirmed the District Court on every point.[16] The court rejected the government's contention that it could prove legislative acts to establish "the purpose of taking a bribe." *Id.* at 26a. The court pointed out that *Brewster* prohibited "any showing" of legislative acts; hence, legislative acts may not be shown in evidence for any purpose in the course of the prosecution. *Id.* at 28a. The court likewise rejected the government's claim that legislative acts were provable by "introducing correspondence and statements that, though not legislative acts themselves, contain reference to past legislative acts." The court noted that allowing a showing by such secondary evidence would render *Brewster's* absolute prohibition meaningless. *Ibid.*

Finally, the Circuit Court rejected the government's waiver argument. Like the District Court, it found it unnecessary to determine whether the Speech or Debate Clause was waivable by an individual Member of Congress. In the light of the purposes of the Clause, it concluded that if the privilege were waivable, such waiver "must be express and for the specific purpose for which the evidence of legislative acts is sought to be used against the member [and] on the facts of this case we find no such waiver." *Id.* at 32a.

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[16] Mr. Helstoski moved unsuccessfully to dismiss the appeal to the Court of Appeals on the contention that 18 U.S.C. § 3731 did not encompass the ruling made by the District Court since that court had not suppressed evidence when it refused to rule on the government's specific proffers of proof. No cross-petition was filed with this Court on that issue.

Summary of the Argument

The constitutional bar against prosecution in the courts for legislative conduct, drawn from the wellspring of English constitutional history, is a fundamental reinforcing mechanism of our tripartite system of government and is a means of assuring the independence of the legislature. The mechanism by which it operates is the barring of jurisdiction of the executive or judiciary over the legislative acts and motives of Members of Congress. The Speech or Debate Clause effects a forum allocation.

In *United States* v. *Johnson, supra,* the Court held that the necessary implication of the Speech or Debate Clause was not only that a legislative act could not be the basis of an accusation against a legislator, but that even if the accusation was of the performance of a non-legislative act, evidence as to the performance of a legislative act would be barred. In *United States* v. *Brewster, supra,* the Court held that bribery to commit a legislative act could be the basis for a prosecution provided (1) no specific legislative act was implicated in the indictment, and (2) no evidence of a legislative act was admitted in evidence at the trial. The principles of *Johnson* and *Brewster* have consistently been applied to criminal and civil litigation, *Gravel* v. *United States,* 408 U.S. 606 (1972); *Doe* v. *McMillan,* 412 U.S. 306 (1973); *Eastland* v. *U.S. Servicemen's Fund,* 421 U.S. 491 (1975).

All of these cases establish the following two-tiered approach:

> a) There is an absolute bar to prosecution and trial in the courts of acts classified as legislative.
>
> b) There is a secondary evidentiary proscription of proof of legislative acts when such acts are not the basis of the charge but are sought to be used as evidence in support of a charge based on the performance of non-legislative acts.

Moreover, this Court has emphasized that a legislator is entitled to be protected not only from the consequences of litigation but also from the burden of defense. Accordingly, a legislator is entitled to expeditious determination of a claim of violation of the Speech or Debate Clause, which may be presented as a motion to dismiss.

I. As to No. 78-546

1. The Speech or Debate Clause, prohibiting "questioning" of legislators outside the halls of Congress with respect to their legislative acts, clearly includes accusing or indicting them in the courts with respect to such acts. The instant indictment should be dismissed because on its face it charges the performance of legislative acts, to wit: the introduction of bills in Congress, specifically identified. Under the Speech or Debate Clause, read together with the Punishment Clause (Art. I, §5, Cl. 2), Congress alone has the power to accuse its Members where the charge is that they have corruptly performed legislative acts.

The indictment in this case is in sharp contrast to the *Brewster* indictment, which at no point specifies or identifies a single legislative act. This fact was emphasized by the government in its brief and noted by the Court in oral argument on *Brewster.* The charge of specific legislative acts in this indictment, by contrast with *Brewster,* puts it squarely in conflict with the Speech or Debate Clause.

This case is to be distinguished from *United States* v. *Johnson.* There an indictment which charged the performance of non-legislative acts made mention of legislative acts by way of proof In such a case it was possible to purge the indictment of the prohibition charge and proceed to trial. Here that cannot be done because the

charge of specific legislative acts is the very essence of the indictment.

This indictment on its face shows that there was a breach of our jurisdictional limitations of the Speech or Debate Clause barring "question[ing]" except in the Congress for the performance of legislative acts. "Question-[ing]" clearly encompasses all aspects of the prosecutorial process, including both the accusation and the adjudication.

2. A) The ruling of the Court of Appeals, that, despite the clear inclusion of legislative acts within its charging part, the indictment may nevertheless go to trial, the Speech or Debate Clause being enforced by an evidentiary proscription at the trial, plainly violates the Speech or Debate Clause. It means that the prosecutorial process is being bifurcated into two separate compartments, the accusatory and the adjudicatory, and that the Speech or Debate Clause is interpreted to protect the legislator only from trial, but not from accusation. Such an interpretation conflicts with the most basic purpose of the Speech or Debate Clause, namely, the protection of the independence of the legislature. The power to accuse and indict a legislator with respect to legislative conduct would give to prosecutors and grand juries a power to hold Members of Congress to account for legislative acts—precisely what the design of the Constitution seeks to prevent.

B) Additionally, the approach of the Court of Appeals violates Mr. Helstoski's right under the Fifth Amendment to be tried only upon an indictment returned by a grand jury. The indictment shows that the grand jury considered it to be a decisive part of its charge that bills had been introduced—clearly legislative acts. To conduct a trial with the very essence of the grand jury's charge being barred from proof effectively means that the indictment will have been amended, in direct contravention of this Court's decisions in *Ex Parte Bain,* 121 U.S. 1 (1887), and *Stirone* v. *United States,* 361 U.S. 212 (1960). The holdings of those cases take on added force in this case because what is involved is a judicial effort to negate the grand jury usurpation of the exclusive jurisdiction of Congress over legislative misconduct.

3. The Speech or Debate Clause was violated not only in the language of the indictment but also in the entire process before the grand jury. The Speech or Debate Clause prohibition of questioning a legislator in any place other than Congress clearly prohibits such questioning before a grand jury, as this Court held in *Gravel* v. *United States, supra.*

An indictment which is the product of violations of the Clause cannot be sustained. This case is wholly different from *United States* v. *Calandra,* 414 U.S. 338 (1974), holding that evidence obtained by police in violation of the Fourth Amendment may be considered, because here it is the grand jury itself which violated the Constitution. Moreover, the absolute prohibition of the Speech or Debate Clause may not be ignored or avoided, whereas the exclusionary principle operative in Fourth Amendment cases, being judge-made law, is subject to such limitations as the Court deems proper.

Similarly, this case is different from *Costello* v. *United States,* 350 U.S. 359 (1956), which upheld an indictment based on hearsay testimony. Again a constitutional proscription functions far differently from a judge-made rule of hearsay evidence. Moreover, unlike *Costello,* this is not a case where, probably because of inadvertence, testimony otherwise probative and proper was presented to the grand jury without adequate testimonial foundation, the substance of which testimony was thereafter presented at trial. The indictment herein was returned by a grand

jury which had not received any testimony or material from Mr. Helstoski respecting legislative acts. All such materials were deliberately chosen by the prosecutor from testimony which had been presented to eight earlier grand juries and then placed before the ninth, and indicting, grand jury.

4. The clear holdings of this Court are that where an issue is raised as to the permissibility of a prosecution under the Speech or Debate Clause, such issue must be determined promptly so that a legislator would be spared the burden of defending against a prosecution inconsistent with the Speech or Debate Clause. Despite the foregoing, the Court of Appeals approached the entire matter of the validity of the indictment and the action of the grand jury in going beyond its jurisdiction from the vantage point of the limited role of mandamus in reviewing lower court pretrial determinations. Such a view is not only inconsistent with the holdings of this Court on the Speech or Debate Clause; it undercuts this Court's holding in *Abney* v. *Clark,* 431 U.S. 51 (1977), to the effect that where the issue is whether a trial may proceed constitutionally, an interlocutory appeal is appropriate.

II. As to No. 78-349

The clear evidentiary rule that emerges from *Johnson* and *Brewster* is that legislative acts may not be proved at trial in any way for any purpose. This rule is not a traditional rule of privilege; it is not intended to promote secrecy. Rather, it secures the separation of powers by reserving receipt of such evidence to the only proper constitutional forum—the Congress. The plain intent of the government's arguments in this case is to overturn the evidentiary proscriptions articulated in *Johnson* and *Brewster.*

1. A) The argument that the government may prove legislative acts provided it does so indirectly, *i.e.,* by letters from a Member of Congress or the Member's oral statements describing legislative acts, finds no support in, and in fact directly contradicts, *Johnson.* Moreover, were such a rule adopted, it would mean that almost all legislative acts would be provable at trial because the legislative process is necessarily public and Members of Congress are constantly communicating their legislative achievements to constituents.

B) The argument that the government may introduce legislative acts in order to prove not the act itself but the legislator's "state of mind" directly conflicts with the long-standing authority that a court may not inquire into the motives of legislators. The contention that the government may prove legislative acts on the theory that its proof is merely incidental to other proofs has similarly been rejected by this Court.

2. The government has argued that, by appearing before the grand jury and giving it legislative materials, Mr. Helstoski waived his Speech or Debate privilege. But the concept of waiver is wholly inapplicable to the Speech or Debate Clause because that Clause establishes institutional rights and allocates jurisdiction. From the days of Jefferson it has been established that the Speech or Debate Clause may not be waived by an individual Member of Congress. And since the Speech or Debate Clause operates as a forum allocation as between Congress and the Article III courts, no Member of Congress acting individually can alter that.

If the concept of waiver were nonetheless considered applicable to the Speech or Debate Clause, it would not be applicable in this case. On the facts here it is a matter of record that at no point was the Congressman told that he was a target. He had every reason to believe that the

investigation was of a third-party crime as to which he was required to testify. Since there was no point at which he was told he was a target of the investigation, there is obviously no point at which he could be said to have waived by voluntary act those rights which a targeted Member of Congress has. The logical import of the government's waiver argument is that any prior statement by a Member of Congress of his legislative activities constitutes a waiver. Since Members of Congress are always publicizing their legislative activities, the effect would be an elimination of the evidentiary proscriptions of the Speech or Debate Clause.

The careful balance struck by the majority of the Court in *Brewster* was made with full recognition of the observations by the minority of this Court as to the difficulty of drawing the line between legitimate and illegitimate receipt of moneys by legislators. By preventing accusations of specific legislative acts and the introduction of proof of legislative acts, the majority believed it would not open the floodgates to criminal prosecution and civil litigation seeking to question legislative acts as being corruptly motivated. The majority's view has thus far been proved correct.

If, however, the government were to prevail in this case, there would be an invitation to criminal prosecution and civil litigation in many cases where it could be contended that legislative acts were motivated by prior or subsequent receipt of funds though such receipt may well have been consistent with the traditional operation of the American political system. Under such circumstances it is not only the legislature that would suffer. The judiciary would become mired in the quicksand of the politicization of its own process.

ARGUMENT AS TO NO. 78-546

Introduction

The constitutional bar against judicial prosecution for legislative conduct is drawn from the wellspring of English constitutional history—the struggle for democracy embodied in the centuries-long confrontation of King and Parliament, of autocratic power and an ever-broadening franchise. For the Framers of our Constitution, the principle of this immunity was so central that it found its way, unanimously and without debate, into the body of the document upon which American government rests.

The Framers recognized in it the embryonic form of the foundation of our governmental structure, the separation of powers. The English experience had taught them that power, even in a democracy, must be dispersed within the government and that the units of power must be kept at arm's length. Thus, immunity from judicial prosecution for legislative acts was the wall the Framers built to protect the body closest to the people's will from both the executive and the judiciary. There can be no mistaking the Framers' purpose: they were not concerned with courtesy, still less with the perquisites and emoluments of office; their purpose in elevating this kind of immunity to a constitutional level was to safeguard, insulate, and protect the independence and diffuse authority of the legislative body from the inevitable and indispensable concentration of power in the executive.

As explained by Mr. Justice Harlan in his opinion for the Court in *United States* v. *Johnson, supra,* 383 U.S. at 177-79, the Speech or Debate Clause in our Constitution is far more than a mere reflection of the struggles for power between King and Parliament in 17th and 18th Century England. It is a fundamental reinforcing mechanism of

the tripartite "governmental structure . . . so deliberately established by the Founders." 383 U.S. at 179.

> "The legislative privilege protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature." [*Ibid.*]

The Speech or Debate Clause was adopted "without debate or opposition," *Powell* v. *McCormack*, 395 U.S. 486, 502 (1969); despite a background of abuse of parliamentary privilege in England (Wittke, *The History of English Parlimentary Privilege* 41-43 [1921]); and the Framers' concern about the possibility of legislative tyranny, *Tenney* v. *Brandhove*, 341 U.S. 367, 375 (1951); because the Founders knew that in a democratic society there was no choice but to protect that branch of the tripartite government which was the "representative of the publick" (2 *Works of James Wilson*, 421 [1967]). Indeed, they believed that without the "great and vital privilege" of Speech or Debate, "all other privileges would be comparatively unimportant or ineffectual," *Story on the Constitution*, quoted in *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880).

The very language of the Speech or Debate Clause shows that the Framers established no substantive privilege protecting a legislator from suffering the consequences of his unlawful acts; rather, the Clause specified *who* could try a legislator for those acts. Thus, the Clause does not say that *any* speech or debate is lawful. The Clause does not establish a license to commit crime. It merely allocates jurisdiction. The desire to keep the judiciary, especially, at a safe distance from the legislature was unmistakeably articulated in the formulation of this Clause as it appeared in the Articles of Confederation: "Freedom of speech and debate in Congress shall not be impeached or questioned

in any *court* or place out of Congress." Art. V, underscoring supplied. The present form of the Clause intended no change of meaning.

In both England and the United States, the mechanism for securing legislative independence was the barring of the jurisdiction of other branches over acts of legislators, giving the legislature the *judicial* power of trial and punishment of unlawful conduct of legislators. But the Framers knew that Parliament had broad judicial powers (*Kilbourn, supra*, 103 U.S. at 183-84) which they had not accorded to Congress, since judicial power had been vested in an independent judiciary under Article III. Thus, if they wished Congress to function judicially with respect to unlawful conduct of individual legislators, they were required further to articulate their intentions as to forum allocation. Hence the specific provision of the Punishment Clause, Article I, § 5, Cl. 2, which prescribes that "Each House may . . . punish its Members for disorderly Behaviour."[17] The Speech or Debate Clause and the Punishment Clause, read *in pari materia*, constitute an unequivocal exception to the grant of judicial power under Article III so that each House—and only each House—may punish its Members for their legislative acts.

On that basis, this Court in its very first Speech or Debate decision, nearly one hundred years ago, said:

> "The Constitution expressly empowers each house to punish its own members for disorderly behaviour. We see no reason to doubt that this punishment may in a proper case be imprisonment. . . ." *Kilbourn* v. *Thompson, supra*, 103 U.S. at 189-90.

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[17] The jurisdiction of a branch of Congress under this Clause extends "to all cases where the offense is such as in the judgment of the [House or] Senate is inconsistent with the trust and duty of a member." *In re Chapman*, 166 U.S. 661, 669-70 (1897).

In *In re Chapman*, 166 U.S. 661 (1897), the Court made clear that this power included inquiry into alleged bribes of Members of Congress.

Thus, the Speech or Debate Clause, combined with the Punishment Clause, effects a forum allocation, vesting the power to accuse and judge with respect to legislative misconduct in Congress and withholding that jurisdiction from Article III courts. Legislators are not given free reign as "privileged persons;" they enjoy no title of nobility; they are simply subject to accusation and trial in the forum of their own branch. And it was clear from the outset that the forum allocation of the Speech or Debate Clause did not relate to *everything* a legislator did. It was applicable only to the extent that the Member was performing a legislative function. By the creation of an institutional as opposed to a personal privilege, the Framers guarded against the abuses of privilege which had tarnished the English Parliament. Thus, the Clause promotes the independence of the legislature rather than the aggrandizement of its Members.

". . . The tradition of legislative privilege is . . . well established in our polity," *Johnson, supra,* 383 U.S. at 179, and has received vigorous enforcement in this Court. Where applicable, the impact of the Clause is unqualified. "Once it is determined that members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an *absolute* bar to interference," *Eastland* v. *Servicemen's Fund, supra,* 421 U.S. at 503; emphasis supplied. And in determining the scope of its application, "The court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view," *Gravel* v. *United States, supra,* 408 U.S. at 617. Hence, the Clause includes within its ambit "anything generally done in a

session of the House by one of its members in relation to the business before it," *Kilbourn, supra,* 103 U.S. at 204.

No less than the acts themselves, the motivation for legislative acts is protected from inquiry, *Johnson, supra,* 383 U.S. at 185. "The claim of an unworthy purpose does not destroy the privilege . . . for it is not consonant with our scheme of government for a Court to inquire into the motives of legislators." *Tenney* v. *Brandhove, supra,* 341 U.S. at 377. *Cf., Fletcher* v. *Peck,* 6 Cranch 87 (1808).

Only 13 years ago the Court first dealt with the question of an allegedly bribed legislator whose legislative conduct might be implicated.[18] *Johnson, supra,* involved a charge that a Congressman had taken a bribe to influence *executive* action. Without hesitation the Court ruled that this did not constitute a legislative act. But what was to be done if, in the course of a trial on that charge of bribery, proof was presented of the commission of a legislative act in support of a charge of corrupt non-legislative activity? And what was to be done with the indictment which, though its main thrust was the charge of non-legislative acts, also included some reference to legislative acts? How was this interlocking of a legislative act and non-legislative activity to be unravelled?

A unanimous Court enunciated a forthright resolution of those questions: Proof of the performance of legislative acts was prohibited. The government was free to

[18] There was never any doubt but that a Member of Congress could be charged with bribery in respect to conduct unrelated to his legislative duties. *Cf., Burton* v. *United States,* 202 U.S. 344 (1906). By contrast, in England, Parliament reserves to itself the sole and exclusive right to punish its members for any bribe, whether or not it relates to the business of Parliament. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present, and Future as a Bar to Criminal Prosecution in the Courts,* 2 Suffolk Law Rev. 1, 13 (1968).

prosecute a claim of criminal conduct involving a non-legislative act. It could prove the receipt of money and the non-legislative act. It was barred from proving the legislative act, even though the sole function of that proof would be to support a charge of performance of a non-legislative act. The retrial of the *Johnson* indictment was not barred because it could be purged and could proceed on its main thrust—the charge of the non-legislative act.[19]

In *Johnson,* the Court specifically rejected two arguments of the government: (a) "that the Clause was meant to prevent only prosecutions based upon the 'content' of speech," 383 U.S. at 182; and (b) "that the Speech or Debate Clause was not violated because the gravamen of the Count was the alleged conspiracy, not the speech," *Id.* at 184.

The *Johnson* rule reflects an inescapable application of the Speech or Debate Clause. For, as the Court explained, once a legislative act, such as a speech in Congress on the floor, is introduced, necessarily "controversy center[s] upon questions of who first decided that a speech was desirable, who prepared it, and what [the legislator's] motives were for making it," *Ibid.* These are precisely the kinds of issues relating to the operation of the legislative process which no judge and jury are empowered to consider or determine.

Brewster was quite different from *Johnson.* Now the government was seeking to establish a bribery case where the sole object of the alleged bribe was legislative activity. The Court was sharply divided on the issue of whether the prosecution was maintainable. The majority held that the government could proceed, despite the fact that the charge "related" to legislative activity; but, said

[19]In fact, on retrial, the government abandoned this entire count. *United States* v. *Johnson,* 419 F. 2d 56 (4th Cir., 1969).

the Court, "[O]ur holding in *Johnson* precludes any showing of how he acted, voted, or decided." *Brewster, supra,* 408 U.S. at 527. The indictment was not subject to dismissal, the majority held, since plainly it made no reference to any specific legislative act.

Three members of the Court argued that the evidentiary proscriptions were not enough. They were of the view that the prosecution was not maintainable at all in view of its relationship to legislative activity. But despite its division, the Court was unanimous in sustaining the straightforward proscriptions of the *Johnson* decision: "These [legislative acts] we *all* agree are protected acts that cannot be shown." *Id.* at 527-28 (emphasis supplied).

The Court was not unaware of the difficulties it was placing in the way of prosecution. "Perhaps the government would make a more appealing case if it could [introduce evidence of legislative acts], but here, as in [*Johnson*], evidence of acts protected by the Clause is inadmissible." 408 U.S. at 528.

Since *Brewster,* the Court has applied the same fundamental approach in three other decisions. The judicial branch could function in areas which "related" to legislative activity, whether in civil (*Doe* v. *McMillan, supra*) or criminal proceedings (*Gravel, supra*). Questions relating to the application of the Speech or Debate privilege in any such proceeding rested upon the nature of the specific act sought to be investigated, charged, or proved: Did it or did it not constitute a legislative act? Disagreements within the Court have centered upon the propriety of a particular classification, particularly as applied to acts precedent to or following legislative acts. See *Gravel, McMillan.* But there has been no question that if an act is classified as legislative, the courts lack jurisdiction to deal with it; testimony relating to it may not be introduced at trial (*Johnson* and *Brewster*) or before a grand jury

(*Gravel*); it may not be the subject of a civil damage suit (*McMillan*) or injunctive process (*Servicemen's Fund*). It matters not that the claim of legislative activity appears to be thin (*Gravel*), corruptly motivated (*Johnson* and *Brewster*) or violative of constitutional rights of citizens (*McMillan* and *Servicemen's Fund*). It is for the Congress, not the courts, to oversee the legislative conduct of Members of Congress.

Two other post-*Johnson* decisions, *Powell* v. *McCormack, supra,* and *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), have addressed in particular the proper procedural approach to a case which touches upon the Speech or Debate Clause. Legislators, said the Court, "should be protected not only from the consequences of litigation's results but from the burden of defending themselves," *Dombrowski, supra,* 387 U.S. at 85; *Powell, supra,* 395 U.S. at 505, n.25. Accordingly, any motion to dismiss "shall be given the most expeditious treatment." *Servicemen's Fund, supra,* 421 U.S. at 522, n.7.

Plainly, the Court has developed what amounts to a two-tier test for the application of the Speech or Debate Clause in both civil and criminal proceedings—both tiers drawn by necessary and inevitable implication from all of its decisions beginning with *Kilbourn*:

> (1) There is an absolute jurisdictional bar to prosecution and trial in the courts of acts classified as legislative. *Kilbourn; Servicemen's Fund; Powell.*
>
> (2) There is a secondary evidentiary proscription of proof of legislative acts when such acts are not the basis of the charge but are sought to be used as evidence in support of a charge based on the performance of non-legislative acts. *Johnson; Brewster.*

In this case, despite the foregoing uninterrupted line of authority, the Department of Justice is pressing the Court

to permit grand juries to receive evidence of legislative acts and motives, to return indictments which on their face charge legislative acts and motives, and to permit prosecutors of such indictments to introduce evidence of legislative acts and motives before petit juries. This case amounts to nothing less than an effort by the Department of Justice to have the Court undermine a line of authority which has been absolutely consistent since *Johnson* and which represents the narrowest possible meaning of the Speech or Debate Clause. If, upon the arguments made by the government in this case, legislative acts and, by necessity, the entire legislative process—the who, what and why of legislation—are to become the grist of grand juries and the fare of criminal and civil judges and petit juries, then as Mr. Justice Miller put it in *Kilbourn, supra,* 103 U.S. at 201, "Of what value is the constitutional protection?"

POINT I

The indictment in the instant case should be dismissed because on its face it charges the performance of legislative acts, to wit, the introduction of bills in Congress. Under the Speech or Debate Clause, Congress alone has the power to proceed against its members where the charge against them is that they have corruptly performed legislative acts.

In allocating jurisdiction with respect to prosecution for legislative acts, the Constitution declares that for legislative acts a Member of Congress shall not be "questioned." This is of course a term of much broader meaning than "charged," "accused," or "prosecuted," and indeed it is beyond doubt that in prohibiting the *questioning* of legislative acts outside of the legislative forum, the Framers certainly meant to include the filing of charges with respect to such acts.

This is made unmistakably clear in *Kilbourn, supra.* Referring to legislative immunity in "many of the colonies," the Court quoted the Constitution of the Commonwealth of Massachusetts, which provided that Speech or Debate "cannot be the foundation of any *accusation* or prosecution, action or complaint, in any other Court or place whatsoever" (emphasis supplied). The Court said, "the general idea in all of [the Colonial clauses], however expressed, must have been the same, and must have been in the minds of the members of the Constitutional Convention." 103 U.S. at 202-203.

It is indisputable that the indictment in this case (*supra,* 2, 3) charges legislative acts. Count I, alleging a conspiracy, specifically charges an agreement to ask for and receive moneys in return for being influenced in "the introduction of private bills in the United States House of Representatives"—bills which are specifically identified in overt acts No. 2, 11, 13, and 16. Counts II, III, and IV each charge a substantive offense of the receipt of a bribe in return for "the introduction of private bills in the United States House of Representatives," which bills are clearly identified by name of beneficiary and date of introduction.

Since *Johnson,* no one may seriously contend that an indictment can go to trial charging a legislative act. An additional feature of *Johnson* and *Brewster* is that they applied an evidentary proscription as a necessary corollary of the Speech or Debate Clause. Legislative acts could not be proved in support of a charge of a non-legislative act. For, as Mr. Justice Harlan explained in *Johnson*:

> "Although historically seditious libel was the most frequent instrument for intimidating legislators, this has never been the sole form of legal proceedings so employed, and the language of the Constitution is framed in the broader terms." [383 U.S. at 182.][20]

It would turn *Johnson* and *Brewster* on their heads to say that they mean that the *sole* impact of the Speech or Debate Clause is as an evidentiary rule, that an indictment which specifically charges designated legislative acts and is therefore plainly outside the jurisdiction of the court may nevertheless be brought to trial, and that a Member of Congress may be forced to answer to such an indictment. This is precisely what is prohibited by *Dombrowski, Servicemen's Fund,* and *Powell,* all *supra.* Legislators must be protected from the "burden of *defending* themselves," *Powell, supra,* 395 U.S. at 505 (emphasis supplied), in the courts against a charge that they performed legislative acts.[21]

The Speech or Debate Clause effectively establishes a plea-in-bar to a prosecution outside Congress when it is founded upon a performance of legislative acts. (*Cf.,*

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[20] By referring at this point to *Strode's Case,* where a member of the House of Commons was charged with interfering with tin mining, the interference being the introduction of legislation, Mr. Justice Harlan made the point that the prosecution of legislators for their legislative acts may be undertaken under a wide variety of formats which might on their face appear not to confront the legislative process. Clearly, however, when proof of legislative acts is submitted in support of any such charge, the legislative process is implicated and the Speech or Debate Clause must apply.

[21] In the Court of Appeals opinion in *Powell* v. *McCormack,* 395 F. 2d 577, 602 (1968), reversed in part on other issues, *Powell* v. *McCormack, supra,* Judge (now Mr. Chief Justice) Burger suggested that it was not even necessary for the legislator to "answer" a charge made in court. While this Court has stated that the filing of a motion to dismiss is required, *Powell, supra,* 395 U.S. at 505, n. 25, the force of the Speech or Debate Clause in barring a *charge* can hardly be questioned.

Burger, *J.*, in *Powell* v. *McCormack, supra,* 395 F. 2d at 602). Where an indictment on its face, as in this case, charges legislative acts, it directly confronts the Speech or Debate Clause, for plainly such an accusation means that a charge of the performance of a legislative act would be tried in an Article III court and not the Congress. Dismissal is the only remedy for such a direct violation of the Speech or Debate Clause.

The Court in *Brewster* considered whether the indictment there could proceed and decided that it could. A careful analysis of the indictment in *Brewster,* as well as this Court's decision thereon, will show how different is the instant case—and how the necessary implication of *Brewster* is that the within indictment may not proceed to trial.

In *Brewster,* a Senator was charged, in five counts of a 10-count indictment, with taking money in return for an agreement to perform official acts and taking money for having performed official acts in violation of 18 U.S.C. § 201(c,g).[22] *At no point in the entire Brewster indictment was a single legislative act specified or identified.* The brief submitted by the government in *Brewster* highlighted the fact that "there is no reference in this indictment to any Speech or Debate in the Senate"[23] and, as the following

[22] Counts 1, 3, 5, and 7 charged he took money "in return for being influenced in his performance of official acts in respect to his action, vote and decision on postage rate legislation which might at any time be pending before him in his official capacity . . . ," in violation of § 201(c). Count 9 charged that he took money "for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity . . . ," in violation of § 201(g).

[23] See supplemental memorandum on reargument submitted in *Brewster* No. 70-45.

exchange shows, this point was highlighted during oral argument before this Court:

> "Q. [by Mr. Justice Marshall] Well, is speech or debate mentioned in the indictment?
>
> Mr. Ramsey [counsel to Senator Brewster]: Oh, no, it is not. You are asking, sir, whether it is said in the indictment that a particular speech was made as—
>
> Q. No, the words 'speech or debate' or anything closely resembling it in the indictment, which is the one thing we have before us.
>
> Mr. Ramsey: No. I would have to answer that directly, sir, that is not in the indictment. There is no word—"

Tr., oral argument, March 20, 1972, p. 18.[24]

Examining the specific allegations of the four counts of the *Brewster* indictment, this Court noted that as written it did not require inquiry into "how he debated, how he

[24] A comparable exchange appears later in the transcript:

> "Q. [by Mr. Justice Marshall] On the facts of this case. Is there any allegation in the indictment that he did vote that way?
>
> Mr. Ramsey: Well—
>
> Q. No, there's nothing in there that says it.
>
> Mr. Ramsey: There is nothing in the record of this?
>
> Q. Am I right?
>
> Mr. Ramsey: Not in the indictment, sir. I have never taken that position.
>
> Q. Well, that's what is before us."

Id. at 27-28.

voted, or anything he did in the chamber or the committee," 408 U.S. at 526. The indictment merely referred generally to "legislation which might at any time be pending" before Congress. Even as to the fifth count at issue the Court noted that "inquiry into the legislative performance itself is not necessary," *id.* at 527, because plainly it referred to no specific legislative act.

Of particular interest on this issue is the majority's response to Mr. Justice White's dissenting opinion. Mr. Justice White "would take the Government at its word," 408 U.S. at 554, that it intended at trial to prove a legislative act that it had not specified in the indictment. The majority rejected his view, insisting that *on the indictment there pending* the prosecution was not required, and in any event would not be permitted, to prove any legislative act.

Since the *Brewster* indictment carefully avoided any reference to a specific legislative act, the Court saw that it did not breach the jurisdictional wall set up by the Speech or Debate Clause. The grand jury in the indictment had not crossed the boundaries of its jurisdiction nor had it called for a trial that would do so.

By contrast with *Brewster,* the indictment in the instant case unabashedly charges a former Member of Congress with the performance of certain specific and identified legislative acts. It directly conflicts with the Speech or Debate Clause, which allocates jurisdiction over such charges to the House.

To be sure, the grand jury in the instant case need not have made these charges of legislative acts in order to make out a valid charge under 18 U.S.C. § 201. It could have proceeded as in *Brewster,* and the trial could have gone forward in accordance with the strictures of that decision. But this grand jury chose not to so limit itself

and insisted on making a charge outside of its jurisdiction.

When the grand jury in this case went beyond the format of the indictment in *Brewster* to spell out the introduction of specific legislation, it also defined the charge which it wished to have tried, although that charge was wholly beyond its jurisdiction. There was no difficulty about the Court's saying in *Brewster* that under the statute it is "unnecessary to inquire into the act or its motivation," 408 U.S. at 527, since neither was questioned in the indictment. Thus, the Speech or Debate Clause posed no impediment to the trial of the indictment which the grand jury returned. But once the *Helstoski* grand jury chose to charge specific legislative acts and motivation, it set the contours of the accusation to be tried—and that case cannot be tried before a petit jury any more than it can be charged by a grand jury.

Plainly, the government is prohibited from proving legislative acts. But if it is to try *this* indictment, if it is to try what the grand jury charged to Mr. Helstoski, then it must prove those legislative acts. By choosing to charge specific legislative acts, as in *Helstoski,* the grand jury has made this a wholly different case from *Brewster* and has rendered it impossible to try this indictment.

Neither is this a case, like *Johnson,* where the Court permitted the indictment to be retried "purged" of all references to legislative acts; 383 U.S. at 185. Inspection of the *Johnson* indictment shows how different it is from the instant one, and why the procedure accepted there is wholly inapplicable to the instant situation.

In *Johnson* the charge was conspiracy to take bribes to perform a non-legislative act, *i.e.,* to bring improper influence to bear on the Department of Justice. The charging part of the indictment includes no reference to

any specific legislative act. The only references to a specific legislative act were in the details of the supporting evidence and in one of 40 overt acts. The indictment could be "purged" of evidentiary allegations and the main thrust of the indictment, which was that Johnson corruptly sought to influence the Department of Justice, would be unaffected. As the Court said, "The making of the speech . . . was only a part of the conspiracy charge." *Ibid.*

Not so here. In this case the conspiracy charge relates wholly and entirely to a bribe for the performance of the legislative acts—the introduction of bills in Congress. And the substantive counts of the indictment again relate explicitly to those acts. Take away the allegations of such acts as set forth in the indictment and the very essence of the indictment is removed.

The *Helstoski* indictment lies not at the periphery but at the very center of the protection afforded Members of Congress under the Speech or Debate Clause. The introduction of bills in Congress is at the heart of legislative activity. Their inclusion in this indictment makes it inevitable that if it is tried, the why's and wherefore's of the legislative process and Mr. Helstoski's motives will be for a jury to determine—precisely what the Framers prohibited.

The design of the Speech or Debate Clause is to maintain within the jurisdiction of Congress the policing and, if necessary, punishment of Members of the House of Representatives and Senators who misuse their powers. That grant of exclusive jurisdiction is as much violated by an indictment which charges legislative acts as by a trial which involves proof of them.

In barring the "questioning" of Members of Congress, the Constitution included all aspects of the prosecutorial process—the accusation as well as the adjudication.

The simple point is that the Speech or Debate Clause is a jurisdictional limitation upon the executive as well as the judiciary. That jurisdictional limitation was breached when the U.S. Attorney sought an indictment outside the jurisdiction of the grand jury and when the grand jury responded by returning the indictment in the instant case.

POINT II

The jurisdictional flaws in the indictment are not correctible and the District Court may not gain jurisdiction by a procedure amounting to an amendment which would effectively undercut the prohibition of the Speech or Debate Clause and violate the Fifth Amendment right to indictment by grand jury.

In its opinion the Third Circuit admitted by necessary implication that the indictment specifically charged legislative acts. The court below, however, was content to disregard all references to legislative acts, although plainly the grand jury considered them consequential. The Court of Appeals said:

> "Since the allegations of the indictment charge a crime even without reference to any acts protected from inquiry under the Speech or Debate Clause,"

those allegations may be ignored (Pet. No. 78-349, 15a).

By taking such an approach, the court below has sanctioned violations of both the Speech or Debate Clause and the Fifth Amendment to the Constitution.

A: The Speech or Debate Clause

This Court in *Brewster* engaged in a painstaking analysis of the indictment, showing that it did not include a charge of legislative acts. Plainly, it did so because if the indictment had involved such charges, the Court necessarily would have sustained the decision below dismissing the indictment. Had this Court believed that what the grand jury charged was irrelevant and that the Speech or Debate Clause could be enforced by an evidentiary proscription at trial, it would not have wasted its time discussing the details of the language of the indictment.

Yet in its opinion the Court of Appeals has done exactly what this Court realized could not be done. By ignoring what the grand jury said and relying exclusively upon an evidentiary proscription at trial, the Circuit Court has effectively bifurcated the prosecutorial process into an accusatory and an adjudicative function. By this division it has eliminated from the Speech or Debate Clause its primary function of protecting Members of Congress from being charged by the executive for the very purpose of bringing about a trial before the judiciary of their legislative acts and motives.

The Constitution gives to Congress alone the right both to charge legislative misconduct and to adjudicate whether it has occurred. That is the essence of the combined impact of the Speech or Debate Clause and the Punishment Clause. That is exactly what Mr. Justice Miller was driving at when he emphasized the common meaning of the Speech or Debate Clause in the federal Constitution and in the early state constitutions (*supra*, p. 36).

Fully appreciating the importance of the *charging* process, this Court mandated that a motion to dismiss such a charge must be given "the most expeditious treatment," *Servicemen's Fund, supra*, 421 U.S. at 533. The approach of the Court of Appeals, if permitted by this Court, would substantially undermine the Speech or Debate Clause.

The U.S. Attorney, the grand jury, and Article III courts do not have the power to question, accuse, or adjudicate legislative misconduct. The Framers recognized that the destructive potential of such powers is too powerful a weapon to leave in the hands of any branch of government other than the legislative; it is a threat to the independence of the legislature. Separating the charging and adjudicative functions, which the decision below sanctions, would negate the core protection of the Speech or Debate Clause. The decision below is an unequivocal message to prosecutors that they are free to direct their attention toward politically disfavored legislators, secure in the knowledge that constitutional excesses by them and by grand juries will be ignored by the judiciary but remembered by the electorate.

The power to hand down an *Helstoski*-type indictment is the power to remove disfavored legislators from Congress. The *charge* that a legislator has corrupted the legislative process, including specific references to legislative acts, is the most serious that can be brought against the Member, for it bespeaks a betrayal of the public trust; it is virtually an automatic and disgraceful close to the career of a Member.[25] While *any* indictment of a Member of Congress has serious implications, the impact of the indictment in this case is of course greater precisely because it charges legislatively acts, implying a breach of the public trust in the area of a Congressman's prime responsibility. The ability to effect the removal of a Member from the Congress by *bringing such a charge* was thus left to the Congress alone and was denied to the executive branch by the Framers.

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[25] To be sure, such a charge would be equally devastating if it emerged from the House of Representatives. But the Speech or Debate Clause vested that power exclusively in the House because the Framers wished the Member's *peers* to weigh the facts before prosecuting the Member's legislative acts.

Is it permissible for the executive to use the grand jury unconstitutionally to obtain an indictment which intrudes upon the legislative sphere, and to publicize the offensive indictment and the charges against the defendant Member of Congress and thereby effect his political defeat, and for the judiciary subsequently to rescue the offensive indictment by holding the legislative acts to be surplussage? What does this "hit and run" scenaria leave of a legislator's right to be held accountable for his actions only to his colleagues and his constituents? What is left of Congress's total jurisdiction, including the power to charge and adjudicate with respect to alleged offenses of its Members? What, in short, is left of the "indispensable" mandate embodied in the Speech or Debate Clause that a Member "be protected from the resentment of everyone, however powerful" whom his acts offend? 2 Works of James Wilson, 421.

B: The Fifth Amendment

The procedure employed by the Third Circuit—in effect eliminating the specific references to legislative acts and considering them surplussage—is exactly what was prohibited by this Court in *Ex Parte Bain, supra,* and *Stirone v. United States, supra.*

In *Bain* the trial court struck some specific and relevant allegations which a grand jury had charged—that it was the Comptroller of the Currency who had been deceived, along with an agent—so that the defendant might be tried on proof of defrauding the agent alone. It was clear that the grand jury need not have made the allegation with respect to the Comptroller, but it did. It was also clear that the allegation was not trivial.

In reversing the action of the lower court, this Court said:

> "While it may seem to the court, with its better instructed mind . . . that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive. . . . How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And *how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury?*" 121 U.S. at 10; emphasis supplied.

What *Bain* prohibits is exactly what the Court of Appeals held here. In the instant case, the face of the indictment demonstrates that the grand jury, having before it evidence of legislative acts, believed that a corrupt bargain had been struck, that the defendant accepted certain sums of money in return for which, in the language of the indictment, he *"performed official acts, to wit, the introduction of [specific] private bills."* It is possible—even likely—that had the grand jury not been told that the legislative acts were performed, it would have questioned whether the money had been accepted.[26] While the court below held that it need not and may not be proved at trial that the official act was performed in return for the money

[26] In fact, such concerns figured decisively in the government's decision to take an interlocutory appeal from the District Court's evidentiary ruling. The government feared that if it could not prove the performance of legislative acts, a petit jury might very well doubt the government's proof of alleged bribery.

allegedly given, the grand jury showed that it considered both halves of the alleged bargain equally relevant, by including both—in the substantive counts and in the conspiracy counts, in the critical charging portions of the indictment as well as in the list of overt acts. There is thus great doubt whether the grand jury would have found Counts I through IV of the indictment had it not been deliberately apprised of the introduction of private bills.

Although the *Court* knows the grand jurors need not have included those paragraphs and phrases in order to charge an offense, the very fact that the grand jurors did so illustrates that proof of the performance of official acts weighed heavily with *them*. *Cf., Bain,* 121 U.S. at 9.

That *Bain* has continued vitality is demonstrated by *Stirone* v. *United States, supra.* There an indictment under the Hobbs Act charged extortion in respect to interstate shipments of sand into Pennsylvania to build a steel factory. Instructions to the jury authorized it to rest a finding of guilt either upon a finding of the foregoing or upon a finding that the sand was used to construct a steel mill which manufactured steel to be shipped out of Pennsylvania. Citing *Bain,* the Court reversed on the grounds that the grand jury had made no charge with respect to shipment of steel out of Pennsylvania.

Plainly, the grand jury in *Stirone,* as in *Bain,* need not have charged with the specificity set forth in the indictment. The indictment could have charged extortion with respect to the interstate shipment of materials into and out of the Commonwealth of Pennsylvania, leaving it to the defendant to obtain more details by a bill of particulars. But the grand jury did not choose that course. It shaped the nature of the case to be tried and defined it. When the prosecutor proved a different case and the court permitted the jury to convict thereon, the defendant's Fifth Amendment rights were violated.

Bain and *Stirone* are not decisions imposing technical rules of pleading; they apply fundamental constitutional principles to circumstances where it is plain—as it is here—that the trial court wishes to try a charge different, in a substantial respect, from that charged by the grand jury. Here, as in *Stirone,* the difference between the indictment and the proposed trial "is neither trivial, useless, nor innocuous," 360 U.S. at 217. And, again as in *Stirone,* "although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same." *Ibid.*

Because of the Speech or Debate implication of the modification allowed by the Court of Appeals, this case goes far beyond either *Bain* or *Stirone.* Neither of those cases involved a change which affected the jurisdiction of the grand jury. If *Bain* and *Stirone* mean that it is not for the judiciary to draft criminal charges, then clearly the court below erred when, by in effect redrafting the indictment, it sought to invoke its Article III jurisdiction over a charge which the grand jury had no power to make and the court no jurisdiction to try.

POINT III

The prosecutorial process was employed in violation of the Speech or Debate Clause in that Mr. Helstoski's legislative acts were called into question before the grand jury, and the grand jury relied thereon as a significant aspect of its indictment.

The Framers were aware of and indeed mandated the grand jury system; however, they did not say, Members of Congress shall not be questioned in any other place except before the Congress or the grand jury. Rather, they made the prohibition absolute; there was to be no point in

the prosecutorial process at which legislative acts could be used to accuse their maker. Congress alone was given that power. The grand jury, whatever it may be—judicial instrument or tool of the prosecutor—is not legislative; it is no creature of Congress. Thus, for the prosecutor to call before the grand jury a Member of Congress as a target and to question him about his legislative acts is to violate the Speech or Debate Clause, as this Court specifically held in *Gravel, supra.* And for the grand jury to call a Congressman when he is not told that he is a target and extract testimony from him which he was required to give in an investigation of third-party crime,[27] and for the U.S. Attorney then to use that testimony before another grand jury, reflects a blatant effort to override the jurisdictional barrier created by the Constitution.

Despite the centrality of the Speech or Debate Clause in our scheme of government, the Circuit Court in its opinion perceived this issue as being governed by (1) the limited scope of mandamus as a device to set aside an indictment, citing *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21 (1943), see Pet. No. 78-349, 19a; and (2) the ability of a grand jury to receive tainted evidence, citing *Costello* v. *United States, supra,* and *United States* v. *Calandra, supra;* see Pet. No. 78-349, 20a-21a. By coupling these limitations on the exercise of appellate and judicial power the Circuit

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[27] See *Gravel* v. *United States, supra,* 408 U.S. at 628-29; and see opinion of Mr. Justice Stewart, dissenting in part, *id.* at 630. This view of the operation of the Speech or Debate Clause in circumstances where a third party crime is being investigated was pressed on this Court by the government. See Brief for the United States, 13 *Gravel, supra.*

The district judge who supervised the grand jury proceedings in this case indicated that he, too, understood *Gravel* to mean that the Speech or Debate Clause is inapplicable when a Member of Congress "is called to testify concerning third party crime." Pet. No. 78-349, 37a.

Court held that the *Helstoski* indictment could be tried regardless of what evidence was heard by the grand jury.

We shall discuss the mandamus issue separately in Point IV, below. At this point we will focus on the *Calandra-Costello* issue.

Plainly, *Calandra* does not uphold a grand jury's jurisdiction to question the legislative acts of a Member of Congress. Indeed, in *Calandra* the Court noted that while the grand jury

> "may consider incompetent evidence . . . it may not itself violate a valid privilege, whether established by the Constitution, statutes or the common-law." [414 U.S. at 346].

The grand jury could not itself compel self-incriminating evidence or order the illegal seizure of evidence. No more can the grand jury question the legislative acts of a Member of Congress. Indeed, in *Gravel, supra,* this Court made absolutely clear that the strictures of the Speech or Debate Clause against questioning "in any other Place" than Congress must be applied to the grand jury room. A grand jury may not compel production by any witness of evidence of legislative acts to be used against a targeted Member nor, having obtained such evidence voluntarily for use against a third party, may it later use that evidence against a legislator as a basis for an indictment.

A Member of the House may be asked to testify about possible crimes of third parties, even of his own aides when they are not covered by the Clause, and legislative acts may be evidence as against those third parties, *Gravel, supra,* note 27. But the giving of testimony against third parties is very different from the grand jury's using legislative acts or a Member's testimony about

them as evidence on which to base an indictment of the Member—which is exactly what happened in this case.

Beyond that, *Calandra,* turning as it does upon the Fourth Amendent and the prophylactic function of the exclusionary rule, is very different from the instant case involving legislative immunity. The Court, having itself fashioned the exclusionary rule as a remedy for Fourth Amendment violations (*Weeks* v. *United States,* 232 U.S. 387, 392 [1913]), was free to limit it and suggest that other remedies might be more apprordiate to safeguard rights under that Amendment. *Cf., Calandra, supra,* 414 U.S. at 354, n. 10.

But the Speech or Debate Clause is wholly different. That Clause *itself* gives effect to the separation of powers as it relates to the protection of the legislature from other branches. It is not left to the judiciary to decide how best to insulate Congress from the executive and from itself; rather, the Framers fashioned, embodied, and inserted into the Constitution their own rule of jurisdiction, an absolute and explicit principle, that "for any Speech or Debate in either House, [Members] shall not be questioned in any other Place."

In a decision rendered by the Court of Appeals a short time after its decision in the instant case there is an indication that the court might have some second thoughts about the relevance of *Calandra* to the issue here involved. In *In re Grand Jury Investigation,* 587 F. 2d 589 (1978), the Third Circuit dealt with a grand jury investigation of Congressman Eilberg. Its comments with respect to *Calandra* seem to be in entire accord with those which we have argued. The court said:

> "One other contention of the United States Attorney bears mentioning. He urges that because a witness may not refuse to answer grand jury questions on the ground that the questions were based upon evidence obtained in violation of the fourth amendment, *United States* v. *Calandra,* 414 U.S. 338 (1974), a congressman who is a target of a grand jury investigation should not be heard in opposition to the use of evidence of his constitutionally protected legislative acts. We see no parallel between the two situations. In *Calandra* the constitutional violation was, at least according to the Court's current majority, an unlawful search and not the subsequent use of the evidence so procured. The exclusionary rule, Justice Powell reasoned, is merely a nonconstitutional prophylactic rule aimed at future violations. 414 U.S. at 354. Under the Speech or Debate Clause, however, the constitutional violation is the use of legislative acts against a legislator. Unlike a violation of the Fourth Amendment, which the *Calandra* Court held to be a *past* abuse and thus the lawful basis for subsequent grand jury questioning, it is the very act of questioning that triggers the protections of the Speech or Debate Clause." 587 F. 2d at 598.

This is clearly not a case where a mere court-made rule of hearsay evidence was ignored by a grand jury, *Costello* v. *United States, supra;* we are dealing here with an explicit constitutional prohibition of the questioning process. Neither is this a case where incompetent evidence was introduced inadvertently or amongst a great mass of other evidence accumulated during the investigative period. *Ibid.*

The findings of the District Court as to the structuring of the grand jury process make clear that the grand jury which handed down the indictment—the ninth grand jury to hear evidence in the case—was in fact presented only that material culled from testimony before eight previous

grand juries which was most inculpatory of the Congressman. Material which tended to exculpate him or impeach the witnesses against him was withheld from the indicting grand jury; Pet. No. 78-546, 19a-22a. Thus, when material offensive to the Speech or Debate Clause came before the indicting grand jury, it did so by virtue of a calculated maneuver by the government, not through inadvertence. Material presented to other grand juries by the defendant himself at a time when the government had not informed him he was targeted—material which, because of the multiple grand juries employed by the government could, and should, have been kept from the indicting grand jury—was instead deliberately laid before it as inculpatory of the defendant. As a direct consequence, the grand jury handed down an unconstitutional indictment.

The only possible justification, however remote, for the use of multiple grand juries in this case would have been to insulate the final grand jury—the indicting grand jury—from hearing tainted or impermissible evidence. Instead, the government, having sought out such evidence in the first place, compounded its disregard of constitutional principles by deliberately giving to the indicting grand jury precisely that material it ought never to have received, namely, the evidence of defendant's performance of legislative acts.

In *Gravel* this Court held that the Speech or Debate Clause applied to grand jury proceedings. In that case the Senator knew that he was being targeted and took affirmative action against the grand jury. Here the Congressman was denied that knowledge and produced legislative materials in the belief that, because third-party crime was being investigated, he was legally required to furnish evidence. When a ninth grand jury was proceeding against *him*, he had no knowledge of that fact. There was no way he could have timely acted to protect his

Speech or Debate privilege before that grand jury. But the lower courts could have—and should have—set aside the handiwork of that grand jury because the indictment and the indicting process which produced it were in excess of the grand jury's jurisdiction.

POINT IV

The Third Circuit mistakenly viewed this case as subject to decision on grounds of the limited role of mandamus.

As noted above (*supra*, pp. 18-19), the decision of the Court of Appeals turned in part on that court's perceptions of the limited role of mandamus to achieve pretrial correction of errors of the district court. Certainly, upon the issue of the grand jury's having violated the Speech or Debate Clause, the Circuit Court specifically said that it was deferring decision until a post-trial appeal if that it eventuated. Pet. No. 78-349, 20a.[28]

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[28] The opinion of the Third Circuit in the *Eilberg* case (*supra*, p. 52) suggests that that court in this case did not consider that it was adjudicating the substantive merits of *any* of the issues raised before it in respect to the validity of the indictment, but was merely deciding that mandamus was not an appropriate device upon which to raise those issues.

In *In re Grand Jury Investigation*, *supra*, 587 F. 2d at 589 the court of appeals characterized its decision in the instant case as follows:

> "In *United States* v. *Helstoski*, *supra*, we refused to issue a writ of mandamus to order a district court to dismiss an indictment said to be the product of Speech or Debate Clause violations. In *Helstoski*, however, we deferred consideration of the question whether such a dismissal is required until an appeal from a conviction. 576 F. 2d at 519."

Deferring resolution of the crucial jurisdictional issues in this case until after possible conviction is contrary to previous decisions of this Court. As pointed out above (p. 34), immediate appellate review of a trial court ruling that the Speech or Debate Clause has not been transgressed is precisely what this Court mandated in *Dombrowski, Powell,* and *Servicemen's Fund.*

Additionally, it is now clear that, under *Abney* v. *Clark,* 431 U.S. 51 (1977), the refusal of the District Court to dismiss the indictment could have been appealed as of right pursuant to 28 U.S.C. § 1291. The District Court's denial of a motion to dismiss the indictment was as final a judgment on the Speech or Debate issue as was the determination of the District Court in *Abney* that double jeopardy principles did not bar a trial. But *Abney* was not decided until after the time for appeal had expired. Mr. Helstoski filed his petition for mandamus with the Third Circuit one week after *Abney.* Effectively he sought by mandamus precisely the same relief to which he would have been entitled on an appeal as permitted by *Abney.*

Even more than the double jeopardy clause, the Speech or Debate Clause, involving as it does intra-governmental relations, is not served by deferring a definitive ruling until after the challenged trial. If the claimed bar to trial is valid, there must be no trial, for post-conviction review is too little and too late. If Members of Congress are to be protected from the obligation of defending themselves in respect to a prosecution that on its face violates the Speech or Debate Clause, then it is clear that relief must be obtainable before trial. Post-conviction relief to achieve the rights protected by the Speech or Debate Clause embodies the admission that a legislator has indeed been questioned beyond the halls of Congress concerning his legislative acts.

Especially is this so once it is recognized that the essence of the Speech or Debate Clause is an allocation of jurisdiction. If, as the Clause prescribes, the judiciary has no jurisdiction to try a case in which legislative acts are questioned, then it must, upon being apprised thereof, dismiss the action. Mandamus is of course the classic vehicle for preventing a usurpation of jurisdiction. *DeBeers Consolidated Mines, Ltd.* v. *United States,* 325 U.S. 212, 217 (1945).

For the foregoing reasons, this Court should determine here and now that the indictment in this case may not proceed to trial.

ARGUMENT AS TO NO. 78-349

Introduction[29]

The clear evidentiary rule that emerges from *Johnson* and *Brewster* is that legislative acts may not be proved at trial in any way and for any purpose. There can be no confusion about what this Court said in both these cases. When the Third Circuit decided this case, affirming the District Court's evidentiary ruling, it relied on the holdings of this Court in both cases. Even the government in its petition for certiorari admits that statements in the *Johnson* and *Brewster* opinions "look in the direction of the result reached by the Court of Appeals." Pet. No. 78-349, 14.

There can be no doubt but that the purpose of the government's argument is to overturn the evidentiary pro-

[29] In view of the Court's having consolidated No. 78-349 and No. 78-546 and the agreement of counsel that Mr. Helstoski file the opening brief, we shall at this point briefly address the issues in No. 78-349 although, without consolidation, the government would obviously have opened on that case. Necessarily we intend further to develop our arguments after the government has presented its brief.

scription of *Johnson* and *Brewster*. It resisted the idea of such proscription in *Johnson* and presented a series of arguments to permit it to prove legislative acts, each of which had been rejected by this Court (*supra*, p. 32). In *Brewster* it had pressed the argument that the Congress delegated to the court its disciplinary functions in respect to its Members, an argument which this Court did not accept. Now the government returns to its old theme and puts forward arguments, many of which were presented and rejected before, but all of which are made in the hope that legislative acts, and thus necessarily the motives and intention of legislators when they perform such acts, shall be subject to indictment and proof in the federal courts notwithstanding the Speech or Debate Clause.

The governments' argument, at least as stated in its petition (No. 78-349, at 15) is as follows:

> "Our argument in support of admissibility focuses on the following factors: (1) the acts and conversations in question occurred outside of the congressional sphere and were not part of the due functioning of the legislative process; thus there is no question here, as there was in *Johnson*, of direct proof of a legislative act privileged under the Clause; (2) the evidence is sought to be introduced for the legitimate purpose of proving respondent's state of mind and guilty knowledge in accepting money, and any references to the occurrence of past legislative acts are incidental; (3) proof of the conversations and other occurrences would not 'draw into question' or 'impugn' any legislative act or 'inquire into' respondent's motives therefore."

An additional contention asserted by the government is that defendant "waived" his privilege by appearances that he made before the grand jury. *Id.* at 21.

While these arguments are made to appear as if they are applicable because of the specific facts of this particular case, it becomes quite evident that were they to be adopted by the Court they would be universally applicable and *Johnson* and *Brewster* would effectively be overruled.

POINT I

The Speech or Debate Clause effects an "absolute" prohibition to the introduction of legislative acts on the trial of a member, regardless of the form of the proof or the claimed purpose of the prosecution.

A. The government's argument is that it wishes to introduce evidence of acts and conversations which occurred outside the Congress and that it may do so even though—indeed for the reason that—such acts and conversations establish the performance of legislative acts. In support of the argument it claims that *Johnson* only prohibited *direct* proof of legislative acts and did not prohibit *indirect* proofs. It should be noted that this distinction is nowhere made in *Johnson*, either explicitly or implicitly. In fact, as hereinafter will appear, one reference in the Court's opinion makes clear that the Court did not consider such a distinction of any significance.

It appears that the government means that though it may not be permitted to introduce a copy of a bill with the former Congressman's name on it, it should be permitted to establish that he introduced the bill by presenting a letter of his in which he advised of that fact, or by having a witness repeat an oral statement in which Mr. Helstoski said he had introduced a bill. The government thus misstates the very nature of the Speech or Debate Clause.

The mere fact that others know of the legislative acts of a Member of Congress hardly serves to make those

acts, published outside the halls of Congress, fair game for prosecutors. The Speech or Debate Clause does not establish a privilege of confidentiality or of non-disclosure which may be defeated by publication. Indeed, the acts of a Member of Congress are *supposed* to be published far beyond the legislature, they *should* be well known to others; the dissemination of information about legislative proceedings is in fact a *sine qua non* of our electoral democracy. Thus, what the government calls "indirect proofs" of legislative acts abound. What conscientious legislator has not distributed a newsletter to his constituents, or made a speech to the voters telling of his legislative activity? Is it at all possible to suppose that, by so doing, a Member of Congress makes it possible for the government, or a private litigator, to "question" him about those legislative acts?

Mr. Justice Harlan did in fact make reference to this point in his opinion for the Court in *Johnson,* 383 U.S. at 184, n. 14. Apparently at trial the government had introduced a reprint of a speech made on the floor of Congress. The Court made clear that it was an unofficial reprint rather than the *Congressional Record.* But, this made no difference. For, as the Court noted, "the use of a copy of the speech in this context necessarily required the jury to read that portion and to reflect upon its substance," *ibid.* Clearly, a reprint of a speech is not a legislative act. Yet Mr. Justice Harlan found that the Speech or Debate Clause was nonetheless operative to bar its use as evidence.

If *Johnson* and *Brewster* could be so easily avoided, there would be no obstacle to the government's proving any legislative act in a judicial forum, merely by making use of a Member's own words to constituents. But the Speech or Debate Clause has to do with the jurisdiction of the courts to consider events which occurred in the legislature, regardless of how they are proved. The

Speech or Debate Clause prohibits proof of legislative acts; it does not distinguish among methods of proof. Since the design and purpose of the Clause are to avoid executive and judicial threats to the independence of the legislature—by permitting the legislature to do its own policing of allegations of improper conduct of legislators—plainly it could hardly matter how a legislative act is sought to be proved.

B. The government also contends it ought to be able to introduce legislative acts to show their maker's "state of mind" when he allegedly took a bribe, with any reference to the actual performance of the legislative act being merely "incidental." The disingenuousness of this argument is matched only by the means the government finds to support it. Thus, the government cites to a reference in *Brewster,* 408 U.S. at 527, that

> "evidence of the member's knowledge of the alleged briber's illicit reason for paying the money is sufficient to carry the case to the jury."

Pet. No. 76-438, 16. Omitted is the immediately preceding sentence: "Inquiring into the legislative performance itself is not necessary." *Ibid.*

Clearly, the Court meant that if evidence of a Member's knowledge of the alleged briber's illicit purpose could be shown, *without proof of legislative acts,* the government could still prosecute a legislator for a bribe related to a legislative act. "Perhaps," said the Court, "the Government could make a more appealing case" if it could prove legislative acts, but the Constitution forbids it. 408 U.S. at 528.

There are, of course, other problems with the government's position. The "state of mind" argument is really no different from the claim that if the allegedly corrupt

motivation for a legislative act can be shown, a legislator can be prosecuted. But Mr. Justice Frankfurter's statement in *Tenney* v. *Brandhove, supra,* reminding us of Chief Justice Marshall's opinion in *Fletcher* v. *Peck,* completely answers this suggestion of the government:

> "The claim of an unworthy purpose does not destroy the privilege. . . . The holding of this Court in *Fletcher* v. *Peck,* 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U.S. at 377.

Furthermore, the idea that proof of legislative acts is merely "incidental" and does not go to the "gravamen" of the offense was raised previously in *Johnson, supra,* and specifically rejected by the Court. 383 U.S. at 184. And, of course, were proof of legislative acts only "incidental," the government would not have halted all proceedings in this case one week before trial in order to pursue its appeal from a decision forbidding such proofs.

C. We find it difficult to respond to the last of the government's contentions because it remains opaque to counsel and is elucidated nowhere in the petition. Obviously, if a legislative act is proved in a trial which charges bribery to commit that act, then necessarily the legislative act is "drawn into question" and "impugned" and the legislator's motive for performing the act is of necessity being "inquired into." The government in its petition simply asserts that this is not so, though by logic and every human experience it is so.

POINT II

The concept of waiver is wholly inapplicable to the Speech or Debate Clause, and if it were applicable, the rulings by both the District Court and the Circuit Court that there had been no waiver are plainly correct.

In its petition the government argued that former Congressman Helstoski waived the application of the Speech or Debate Clause by appearing before the grand jury and testifying as to his legislative acts and presenting documents establishing them. As authority for this position the government relied exclusively on a Seventh Circuit panel holding in *United States* v. *Craig,* 528 F. 2d 723 (1976), which was thereafter vacated *en banc,* 537 F. 2d 957 (1976), and which related to a claim of a state or common law Speech or Debate privilege, not the federal constitutional privilege here at issue.

Additionally, in support of its argument that the Speech or Debate privilege is "a personal privilege available to individual Congressmen" and therefore waivable, the government cites a wholly inapplicable footnote in *Gravel* (Pet. No. 78-349, 23a) which pertains to a Member's control over his *aide's* claim of legislative privilege.

Neither the District Court (Pet. No. 78-349, 59a) nor the Circuit Court (*id.* at 30a) found it necessary to decide whether the Speech or Debate Clause was waivable by a Member of Congress since both courts were satisfied that on the facts of this case there could have been no waiver. Both courts, however, emphasized that the Speech or Debate Clause could not be analyzed as a purely personal privilege because of the institutional function of the Clause.

Our position is presented alternatively:

We do not believe that the concept of waiver can be applied to the Speech or Debate Clause. Both its institutional nature and its jurisdictional function bar any such concept; but if the Court should be of the view that under some circumstances the Speech or Debate Clause can be waived, then certainly the decision of both the District and Circuit Courts that there was no waiver in this case should be sustained.

A. Plainly, the function of the Speech or Debate Clause is not the protection of the confidentiality of communications; legislative acts are normally public, as we explained above. As we have argued, the Speech or Debate Clause does not create a privilege or immunity from prosecution; it simply creates a jurisdictional barrier to examination of the legislative acts in a prohibited forum. It was not the goal of the Framers to privilege legislators or immunize them from the consequences of wrongdoing; it was rather their design to assure that the examination of the acts of a legislator could take place only within the House to which the legislator was elected, thus protecting that entire branch of government from the intrusion of other branches. It is this jurdisdictional perspective which clarifies the nature of the Speech or Debate Clause and determines the issue of waivability. Once it understood that *only* Congress has jurisdiction over the legislative misdeeds of its Members, it is clear that such jurisdiction may no more be yielded by an individual Member than can the jurisdiction of this Court be given up by the will of one Justice.

Neither can the court acquire jurisdiction where the Constitution has withheld it. No one would seriously contend that if a citizen were to testify voluntarily before a federal grand jury inquiring into violations of a state's

Tenement Safety Act, that the grand jury could thereafter indict and a U.S. District Court could try violations of that state statute. And let us suppose the federal grand jury entered the scene by an investigation that might have been within its ambit—*e.g.*, a failure to report rental income derived from the tenement—and then expanded its inquiry into matters such as overcrowding of the tenement or lack of adequate fire escapes, and the witness-target testified about those matters. Certainly the jurisdiction of the federal court could not be thus expanded.

We suggest that the separation of powers which flows in part from the Speech or Debate Clause is, in the present context, on a constitutional par with the sensitive balance embodied in our federalism. The federal judiciary is not authorized to cure all perceived wrongs. Just as some alleged wrongs must be resolved by the individual states, so others must be resolved by the Congress.

The government's citation of note 13 in *Gravel*, 408 U.S. at 622, as authority for alleged waivability, is plainly misplaced. It is clear that the cited footnote merely connotes that it is the Member, and not the aide, who determines whether the aide's services are such that immunity may be claimed. For example, a Member obviously would have the power to repudiate a claim of privilege by his or her cook.

The only truly authoritative exposition of the issue of waiver is that enunciated by Thomas Jefferson in his *Manual of Parliamentary Practice*, written only a few years after the adoption of the Constitution:

> "The privilege of a member is the privilege of the House. If the member waive it without leave, it is

ground for punishing him but cannot in effect waive the privilege of the House." *Id.*, § 30, p. 130.[30]

The House itself acted in accord with Jefferson's statement and, as early as 1846, declined to make a general rule allowing waiver, choosing instead to consider such matters individually, III Hind's *Precedents of the House of Representatives,* 2660; in 1876, Members seeking leave to appear before a District of Columbia grand jury which had summoned them said:

> "Inasmuch as it seemed to be well settled that the privilege of the Member was the privilege of the House and that privilege could not be waived except with the consent of the House, they had thought it their duty to submit the matter to the House." III Hind's Precedents, 2662

[30] Jefferson in the *Manual* cites to debates in Parliament in 1675, in particular a conflict between Sir John Fagg, a member of the House of Commons, and one Thomas Shirley. After litigation in the Court of Chancery regarding the sale of property, Shirley brought his case to the House of Lords on appeal. The Lords ordered M.P. Fagg to answer Shirley's petition as he had answered other of Shirley's pleadings in the courts below. Commons heard of the Lords' order and required Fagg to ignore it, meanwhile ordering Shirley arrested for breaching the privilege of the House. Apparently it was raised as an argument against the actions of the Commons that Fagg, in responding to Shirley's suit in the lower court, had waived whatever privilege he might have had against appearing before the House of Lords. In answer, it was stated by the Speaker (and was thus apparently a rule of Parliament) that:

> "If a Member wave [*sic*] his privilege, he does what he ought not to do; it is the privilege of the House—it may be an argument to punish the Member but not to wave the privilege of the House."

III Grey, *Debates in Parliament in 1675,* 140.

In its petition the government refers to *Coffin* v. *Coffin, supra,* 4 Mass. at 27, for a suggestion that the privilege is personal and therefore, so it argues, waivable (Pet. No. 78-349, 23a); however, the court in *Coffin* was dealing with the obverse of the situation here presented. In *Coffin,* the court indicated that the legislature could not waive the privilege against the wishes of a Member, an authority that would doubtless be relevant against a government claim that Congress had the power to delegate Speech or Debate prosecution to the courts.[31] Clearly, however, whether or not the institution has the power to waive an individual Member's right is wholly irrelevant to the question whether an individual Member may waive the right of the institution and thereby expand the jurisdiction of the courts.

Thus, the history of legislative immunity both here and in England reveals no support for the startling proposition that individual Members of the legislature may waive the jurisdictional immunity granted that branch as a whole, nor can the government find any solid or substantial support for that argument. Indeed, precedent, logic, and the views of the Framers all compel the opposite conclusion. The Speech or Debate Clause is designed to safeguard an institution. It does so by an allocation of jurisdiction which no individual Member may undermine.

[31] This issue was expressly left open in *Johnson* and *Brewster.*

We do not know whether the government intends in this case to assert again that Congress has delegated its powers in respect to bribery cases to the courts. We will not at this time address that issue. It is not mentioned in the Questions Presented in the government's petition although there is a reference to this matter in a footnote; Pet. No. 78-349, 23, n.15. If the government should press this point, we will deal with it in our reply brief.

B. But even if in some situations a Member of Congress could waive Congress' Speech or Debate privilege, plainly such a waiver could not be found on the facts of this case.

As we pointed out above, when the Congressman initially appeared to testify—as he was required to do as a witness in a grand jury investigation (*Cf. United States* v. *Nixon,* 418 U.S. 683, 709 [1974])—he had every right to believe that the investigation concerned third-party crimes as to which the Speech or Debate Clause would be inapplicable. The question of the waiver of his immunity against prosecution in the courts would not even be at issue until such time as he was told that he, and not a third party, was the target of the grand jury investigation. While we recognize that in other circumstances a prosecutor may not be obliged to notify a witness that he is a target, *United States* v. *Washington,* 431 U.S. 181 [1977]), certainly where the prosecutor seeks to induce or to argue waiver of the Speech or Debate privilege, he would be required to signal his intention.[32]

Recognizing the powerful institutional considerations which are at the heart of the Speech or Debate Clause, the Court of Appeals quite properly concluded:

> "Out of deference, then, to a co-equal branch of government, we hold that even if an individual member may waive his Speech or Debate privilege—a question we do not decide—any waiver in the context of a criminal prosecution must be express and for the specific purpose for which the evidence of legislative acts is sought to be used against the member." [Pet. No. 78-349, 32a].

[32] The accused in *Washington,* when before the grand jury, was carefully informed of his self-incrimination privilege and clearly chose to waive it. 431 U.S. at 188. The Court found no constitutional requirement that the self-incrimination warnings be specially augmented for those witnesses who were potential defendants. Here, in contrast, there was no Speech or Debate Clause warning. How, then, could the Speech or Debate privilege be waived, when Mr. Helstoski never even appeared before the indicting grand jury, and was never informed that the Speech or Debate Clause was an issue during his appearances before eight other grand juries? Surely he should have been informed that his legislative conduct was the grand jury's prime concern.

The flaw in the government's waiver argument is revealed by the import of the position it maintained in the Court of Appeals. There, the government argued that waiver was effected not only by testimony before the grand jury but also by disclosures to constituents in correspondence and oral statements that the Congressman had performed legislative acts. If the test is indeed mere voluntariness of disclosure, such an extension of the argument is inevitable. If the grand jury testimony is taken as constituting a waiver because the testimony was voluntarily given, there is no basis for denying that a waiver may follow from other voluntary statements, which, as noted at page 60, *supra,* abound due to the necessity to publicize legislative acts. A legislative body in our society is a public institution which has as one of its important functions informing the public about its activities. Legislators do not keep their legislative activities confidential: they speak about them as much as they can, and indeed they should. This point was emphasized by the District Court in rejecting the government's waiver argument. Pet. No. 78-349, 56a.

The waiver argument presented in this case is one of universal applicability. Were it to be accepted, no Member of Congress could find protection in the Speech or Debate Clause.

CONCLUSION

The majority opinion in *Brewster* took careful note (408 U.S. at 521, 527-28) of dissenting opinions filed by Mr. Justice Brennan and Mr. Justice White, in which each argued that the realities of the "representative status" of Members of Congress should have led the Court away from permitting any prosecution for bribery to commit a legislative act.[33] See 408 U.S. at 542, quoting *Conflict of Interest and Federal Service,* 14, Association of the Bar of the City of New York (1960). Cognizant of the dangers pointed out by the dissenters, the *Brewster* majority noted that it had struck a reasonable balance. As the majority put it:

> "It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members." [408 U.S. at 525].

The government in this case seeks to destroy the careful balance spelled out by the majority in *Brewster.* There can be no doubt that if the government's view of this case were adopted, "inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts" would become the standard grist of both

[33] Insight into the difficulties in dealing with these subtleties in jury trials is provided in the thoughtful opinion of Judge Wilkey in *United States* v. *Brewster,* 506 F.2d 62 (D.C. Cir., 1974). In that case the conviction of Senator Brewster after remand by this Court was reversed on the grounds of improper instructions to the jury on this very point.

criminal and civil litigation in innumerable contexts.[34] The Court has never drawn a distinction between civil and criminal proceedings in determining the impact of the Speech or Debate Clause.[35] If the view were adopted that legislative acts and the motivation therefor may be the basis of complaint or indictment and the basis of trial, it is awesome to contemplate the rash of civil and criminal trials that could develop out of charges of conspiracy involving Senators and Representatives who received campaign contributions from special interest groups concerned with legislation which favors one group of the population at the cost of another. See, by way of example, the natural gas compromise in the Energy Bill.

Though the Department of Justice can perhaps be relied upon to control career-oriented U.S. Attorneys,[36] we

[34] The *majority* of cases in which the Speech or Debate Clause has been invoked in this Court have been civil. See, *Kilbourn, Dombrowski* v. *Eastland, Powell* v. *McCormack, Doe* v. *McMillan, Eastland* v. *Servicemen's Fund,* and also *Tenney* v. *Brandhove,* involving a state Speech or Debate Clause. The only criminal cases have been *Johnson, Brewster,* and, at the grand jury stage, *Gravel.*

[35] Indeed, if a distinction were to be drawn, civil trials would be freer of Speech or Debate restrictions than criminal prosecutions. Mr. Justice Harlan, in his opinion for the Court in *Johnson,* made clear that the Speech or Debate Clause "was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney,* but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." 383 U.S. at 181.

[36] A former Attorney General of the United States ordered a U.S. Attorney not to sign an indictment—but that indictment was against a Congressman who enjoyed political favor in the White House. See, Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers,* 86 Harv. L. Rev. 1113, 1239 (1973).

(Footnote continued on following page)

know of no control over imaginative civil litigation lawyers, public interest or otherwise, who would be tempted to fish the troubled waters of the legislative process, charging injury to their clients from legislation which they would assert was traded for campaign contributions. The obvious defendants in such suits would be both the special interest group and the legislators, who would be charged as co-conspirators. It is quite literally impossible to predict the myriad cases that may evolve from a breakdown of the kind of protection that has been afforded by *Johnson* and *Brewster,* namely, the simple but firm rule that the legislative process is not to be tried in the courts.

In short, allowing grand juries to return indictments that charge legislative acts and allowing proof of such legislative acts at trial, would open the floodgates to judicial involvement, civil and criminal, in the legislative process. These gates are now effectively barred by the restrictions developed by this Court in *Johnson* and *Brewster* as the narrowest possible construction of the Speech or Debate Clause consonant with both the separation of powers and the integrity of the legislature. However limited are the protections of those cases, they have been effective up until now to maintain the balance which the Court struck. That equilibrium is now threatened.

(Footnote continued from preceding page)

Unfortunately for Mr. Helstoski, he was a Democrat at a time when the U.S. attorney and the occupant of the White House were Republicans. Prior to this indictment, Mr. Helstoski had not only been an extremely active Congressman, he had also been prominent in political life in New Jersey, overcoming four gerrymanderings of his District by a Republican-controlled legislature. At one time he had been considered a serious contender for the governorship. On the federal level he was one of the five Members of Congress who on October 23, 1973, joined in the first impeachment resolution directed at President Nixon (H. Res, 649, 93d Cong., 1st Sess.).

The independence of the legislature and its ability to retflect without distortion the many competing and comprising interests which its Members were chosen to represent was given a higher priority by the Founders than the detection, detention, and punishment by the *courts* of one of those representatives. The Framers felt it wiser on balance to give to the Congress itself the authority, denied the executive and the judiciary, to scrutinize and, if need be, to punish the acts of its Members. This institutional view of legislative immunity serves to protect the judiciary as well as the legislative branch, for any more restricted or narrow understanding of the Clause would inevitably draw the bench closer to the quicksand of politicization of its own processes. To limit the Clause is to allow the executive to utilize the judiciary as a subordinate tool; to limit the Clause is to endanger the independence, not of one branch, but of two.

For the foregoing reasons, in No. 78-546 the judgment of the court below should be vacated and the cause remanded with instructions to dismiss Counts I through IV of the indictment. Failing that, in No. 78-349 the judgment of the court of appeals should be affirmed.

Dated: Newark, New Jersey
January 24, 1979.

Respectfully submitted,

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Attorney for Henry Helstoski

On the Brief:

LOUISE HALPER

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-349

UNITED STATES OF AMERICA,
Petitioner,

v.

HENRY HELSTOSKI,
Respondent.

No. 78-546

HENRY HELSTOSKI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

HONORABLE H. CURTIS MEANOR,
Nominal Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR HENRY HELSTOSKI IN REPLY IN NO. 78-546 AND IN RESPONSE IN NO. 78-349

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Introduction

In the 200 years of our nation's history there have been only eight cases in which this Court has dealt with the delicate problems inherent in any application of the Speech or Debate Clause in the federal Constitution. Only two—*United States* v. *Johnson,* 383 U.S. 169 (1966), and *United States* v. *Brewster,* 408 U.S. 501 (1972)—have involved claims of corruption on the part of federal legislators. In its opinions in both cases, this Court approached the issues with care, sensitive to the need to protect legislators from "possible prosecution by an unfriendly executive and conviction by a hostile judiciary," *Johnson,* 383 U.S. at 179.

Johnson and *Brewster* articulated clear rules as to

a) whether a particular indictment may proceed to a prosecution in an Article III court; and assuming the indictment can proceed,

b) what evidentiary strictures must be imposed upon a trial in such a tribunal.

The Solicitor General's[1] 124-page brief in this case is a double-barrelled attack upon both those opinions. The brief constitutes an unvarnished attempt to have this Court adopt a hitherto-rejected interpretation of the Speech or Debate Clause which would inevitably set the judicial system upon a collision course with Congress.

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[1] In our main brief we refer to the petitioner in No. 78-349 and the respondent in No. 78-546 as "the government." In view of the subsequent filing of a brief *amici curiae,* it is evident that representatives of the executive and the legislative branches of the government are in conflict with respect to the issues in this case. Accordingly, we shall in this brief generally use terms such as "the prosecution," "the Solicitor General," or similar references which will more accurately describe our adversary.

What is remarkable is that this massive effort is attempted in the face of the prosecution's reassurance that it is virtually unnecessary: that "Bribery prosecutions of present or former Members of Congress are, fortunately, not commonplace occurrences" (Pet. No. 78-349, 10) and at a time when, as is carefully pointed out in the brief of *amici curiae* (pp. 16-27), Congress is undertaking a major and successful effort to expand and strengthen its own self-policing mechanism and thereby more fully implement the design of the Speech or Debate Clause.

It is also remarkable that the executive branch of the government is willing to confront Congress on this question when the matter at issue is the admissibility of evidence which the prosecution says is not indispensable to its case. Indeed, as to this, the Solicitor's brief suffers from a deep-rooted and internal contradiction which goes directly to the heart of its case. The contradiction appears in the Solicitor's assertion, on the one hand, that the proof of performance of legislative acts which it seeks to introduce at trial is not "required," "needed," or "necessitated" (Br. 51, 63, 96) and the Solicitor's willingness, on the other hand, to precipitate a major confrontation involving all three branches, to the end that this evidence be sanctioned in an indictment and admissible at trial.

Of course, the prosecution is in a quandary: If it argues that its prosecution of Helstoski *requires* the proof of legislative acts, it becomes immediately apparent that the prosecution violates the Speech or Debate Clause and involves the "questioning," in a prohibited forum, of matters which are immune from Article III judicial inquiry. The prosecution knows that if indeed these proofs are necessary, they are *ipso facto* inadmissible upon the main arguments the government makes. As the District Court said, "If the government for whatever reason cannot prove

its case without reference to Helstoski's past performance of a legislative act, then the prosecution will have to be foregone" (Pet. No. 78-349, 60a-61a).

The prosecution's tactic then is to claim that these proofs are unnecessary and for that reason it ought to be allowed to use them. In other words, the prosecution in effect says, "Admittedly, if we need the proof we can't have it; but as we really do not need it, we should be permitted to use it." This strange argument buttressed by a claim that the prosecution is unconcerned with the truth or falsity of its proof (Br. 63), hardly masks the deeper fact that, in this case, the proof of legislative acts is vitally necessary if the prosecution is to have any hope of winning a conviction—as indeed it was necessary in order to procure an indictment. That is why the prosecution delayed the trial of this case five days before its opening by taking an interlocutory appeal from the ruling of the District Court; that is why the Solicitor General filed his petition for certiorari to review the Court of Appeals' ratification of the holding of the District Court; that is why the trial of this case has been delayed, at this date, for more than two years.

If the prosecution is to rescue its proceeding against Mr. Helstoski, it can do so only by putting before a petit jury the following: a) a witness who claims to have paid Mr. Helstoski a sum of money and b) the legislative act which that witness claims Mr. Helstoski did in return for the money. Faced with Mr. Helstoski's denial of his involvement in such a scheme and the extreme vulnerability or ambiguity of the testimony of the perhaps two witnesses adverse to Mr. Helstoski, the government cannot rely upon the witnesses alone but must wave the "bloody shirt" of the actual legislative acts if it is to convince a jury. It is this which underlies the prosecution's readiness to

stage a constitutional confrontation with Congress over matters which it ostensibly "does not require." It is this which underlies the Solicitor's desire to reargue questions which have been raised before and settled by this Court twice within the past 13 years.

We proceed to a reply to the Solicitor's brief. After dealing first with his statement of the questions presented and his statement of the facts, we shall turn to the specific issues in the sequence that they appeared in our brief. We shall first deal with the issues in No. 78-546 and then with the issues in No. 78-349.

The Solicitor General's Statement of Questions Presented

The Solicitor General has restated the questions which Mr. Helstoski presented in *his* petition which the Court granted. The alteration is by no means minor; it in fact signals one of the major difficulties in the Solicitor's case.

Question I in No. 78-546, as set forth both in our brief (p. 1) and our petition, queried whether it was the District Court—or the Congress—which had the *jurisdiction* to try an offense which on its face charged the performance of specific and identified legislative acts.

The Solicitor General restates the question so as to eliminate any reference to the jurisdictional issue. This is consistent with his view, as expressed in Br. 112, n. 48, that the Speech or Debate Clause does not reflect a jurisdictional allocation of disciplinary functions but is a mere rule of evidence.[2] We had thought that since *Kilbourn* v.

[2] In our main brief (pp. 29-30) we refer to the interaction between the Speech or Debate Clause and the Punishment Clause (Article I, §5, Cl. 2) and show that both clauses, read *in pari materia*, clearly effect a jurisdictional allocation.

Thompson, 103 U.S. 168 (1880), the first case in which the Court addressed the Speech or Debate issue, the jurisdictional impact of the Speech or Debate Clause has been clear. See, 103 U.S. at 189-90. Indeed, the Court confirmed this in its most recent expression on the Speech or Debate Clause in which it explained that the Clause operates to prevent "judicial power [from being] brought to bear on members of Congress." *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975).

Mr. Helstoski's position is by no means dependent upon an analysis of the Speech or Debate Clause as a limitation or grant of jurisdiction. We nevertheless believe that jurisdictional allocation is at the heart and core of the Speech or Debate Clause and from that vantage point some of the positions of the prosecution (*e.g.,* mandamus and waiver) are not even arguable.

The Solicitor General's Statement of Facts

We observe without further comment the following:

The prosecution does not dispute: a) that during all his appearances before the grand jury when he gave legislative materials, Mr. Helstoski had every reason to believe that the aide whom he had employed some six years previously was the target—not himself—and that from and after the United States Attorney's refusal to advise him whether he was the target, Mr. Helstoski raised the Speech or Debate issue and declined to give legislative materials; b) that the grand jury which indicted Mr. Helstoski was a different one from the eight grand juries before whom he had appeared, and the ninth—the indicting—grand jury never saw him and received legislative materials, not from Mr. Helstoski but from the United States Attorney.

We also note the following:

The prosecution's quotation at Br. 7 of a warning to Mr. Helstoski that he need not produce documents omits to mention that the warning was plainly in the context of the Fifth Amendment. The Speech or Debate Clause, as the Court of Appeals found, was not mentioned (Pet. No. 78-349, 6a).

At Br. 13, the government, under the heading "Further Proceedings," refers to a pretrial conference in the District Court on August 3, 1978. Those proceedings are not part of the record in this case. Nevertheless, since the Solicitor has plainly misstated what occurred there, we have lodged with the Clerk of the Court a transcript of those proceedings. The transcript simply does not support the government statement, as follows:

> "The court also indicated that it would exclude evidence of payments of money to respondent subsequent to any legislative act, on the theory that the jury might infer from proof of such payments that respondent had fulfilled his part of the illegal bargain by performing legislative acts." (Br. 13-14)

On August 3, 1978, the District Court made clear that it understood the *Johnson* and *Brewster* cases to prohibit a showing at trial of legislative acts; that it would enforce such a rule but would decline to give advance ruling on 23 proffers of proof; that its ruling on each offer of proof would necessarily be determined by the context in which the proofs came in.

PART I

(The Issues in No. 78-546)

The jurisdiction of the District Court to try the indictment herein.

Any discussion of the issue as to the jurisdiction of the District Court to try this indictment[3] turns upon a careful analysis of the *Brewster* and *Johnson* cases, both of which specifically addressed the language of their indictments. The prosecution's discussion of the indictment issue in both cases is flawed.

A. The contrast between the *Brewster* and the *Helstoski* indictments.

The prosecution's insistence that the *Helstoski* indictment "is not materially distinguishable" from that in *Brewster* (Br. 93) reveals a failure to comprehend both the language of the *Brewster* indictment and the import of the *Brewster* opinion as a sequel to *Johnson*. *Johnson* had made clear that the bribed legislator may be tried in court where the bribery is for matters other than those referring to the legislative process. The Court, however, would simply not permit such a trial of a legislator to degenerate into a trial of the legislative process, which was inevitable if the prosecution was permitted to prove legislative acts. The predictable and necessary defense of the legislator would be that the legislation was justified

[3] The prosecution, sensitive to its implications, eschews jurisdictional language. Hence, it refers to this issue as involving the validity of the indictment. This portion of our brief responds to the Solicitor General's argument in Point II of his brief (Br. 88-106).

and the jury would then be called upon to pass upon the choice of motives of a legislator, exactly what is prohibited by the Speech or Debate Clause and our system of separation of powers. (See our fuller discussion of *Johnson, infra,* pp. 39-42.)

In *Brewster,* this Court permitted the judicial prosecution of a legislator "bought" by private interests and who acts as the tool of the briber on any matters concerning those interests.

The significance of this Court's ruling in *Brewster,* following so closely on *Johnson,* is that it sharpened the proposition that United States legislators may be tried in court for bribery, but that the legislative process itself, even when it is alleged to be corrupt, may not be tried. Thus, in *Brewster,* since it merely alleged that the legislator acted in behalf of the briber rather than the public interest in those of his official actions which concerned his private employer, it was unnecessary to inquire into any specific act the legislator undertook. It was enough to establish that on any matters generally affecting his employer, he agreed to act as the employer wished.

The mere fact that a Member may be tried for bribery in that case is not to say that a Member may be tried for bribery in conjunction with a specific and identified legislative act. What may be tried is the buying of a legislator but not the buying of a legislative act. The latter inquiry, as *Johnson* held, is inextricably bound up to the legislative process and thus is subject *solely* to the examination of Congress. A shorthand way of saying this may be that the judicial branch may try the buying of a legislator, but only Congress can try the buying of a bill. The corruption of the legislative process is a matter for Congress alone, though the corruption of a legislator can be the subject of judicial inquiry.

Such a formulation protects the independence of Congress and its undoubted power, indispensable to our tripartite democracy, to be the sole judge of its processes. At the same time, it permits judicial inquiries into the enticement or bribery of individual Members where such inquiries do not implicate the legislative process itself. This is the plain meaning of this Court's repeated assertions in *Brewster* that, in that prosecution,

> "[N]o inquiry into legislative acts or the motivation for legislative acts is necessary" (at 525)
>
> and
>
> "[I]nquiry into a legislative act or the motivation for a legislative act [is not] necessary to a prosecution under this statute (at 526)
>
> and
>
> "[A]n inquiry into the purpose of a bribe 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them' " (*ibid.*)
>
> and
>
> "Inquiry into the legislative performance itself is not necessary" (at 527)
>
> and
>
> "[A] member may be convicted if no showing of a legislative act is required" (at 528)
>
> and
>
> "[T]he Clause . . . does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not part of the legislative process itself" (*ibid.*).

In sum, this Court makes the point that where the bribery is such that it can be shown without reference to particular acts, where the corruption of the legislator may be proven without proving the corruption of the legislative process, the prosecution may proceed in an Article III court.

This is the import of the holding in *Brewster* that:

> "[T]he Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch . . ., but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members." 408 U.S. at 524.

In this context a reading of the *Brewster* indictment shows that the Senator was not charged with having performed a specific legislative act or, for that matter, any legislative act. He was charged with taking money generally to represent a private corporation's interests in the Senate. The *Brewster* indictment charges him with accepting pay from a source other than the United States for being a Senator. In other words, the indictment in essence charged him with trying to function not only as the Senator from Maryland, but also as the Senator from Spiegel, on retainer to that company.

There was no difficulty in trying that case without an iota of proof of a legislative act. The crime was essentially taking money from private sources for performance of a public office and *that was in fact the case that was finally tried. United States* v. *Brewster,* 506 F. 2d 62 (D.C. Cir., 1974). The District Court, in the view of the majority of this Court, had jurisdiction to try that offense

because by its nature it did not require proof of any legislative act. Brewster was charged with being a corrupt legislator who had hired himself out *ex officio* to private interests. The *Brewster* indictment did not charge that any particular legislative action was corrupt.

That is not this case. The *Helstoski* indictment charges the taking of money to do specific legislative acts and that is what the prosecution seeks to try. While the prosecution may argue that 18 U.S.C. §201(c) does not *require* proof of legislative acts, the very reason it took an interlocutory appeal and pressed a petition before this Court was to prove such acts at the trial of the *Helstoski* indictment.

The prosecution is refusing to face the reality of the difference between the two indictments when it says:

> "The actual performance of those acts is not part of the offenses charged here, just as it was no part of the offenses charged in Brewster." (Br. 95)

The *Brewster* indictment could be tried—*as indeed it was*—with no proof of any legislative act because the *Brewster* indictment did not rest upon the doing of any legislative act. It rested upon Brewster's agreement to use his official position in whatever way the Spiegel Company wished in respect to any legislative matters that concerned the company. But the *Helstoski* indictment cannot be tried that way, if the court is to try the grand jury's indictment. The prosecution is indeed seeking to try the *Helstoski* indictment exactly as it presented it to the *indicting* (the ninth) grand jury, *i.e.*, with proof of the performance of legislative acts.

This Court could quite properly say in *Brewster*:

> "An examination of the *indictment* brought against appellee and the statutes on which it is founded

> reveals that no inquiry into legislative acts or motivation for legislative acts is necessary for the government to make out a *prima facie* case." 408 U.S. at 525 (emphasis supplied).

Thus, the Court was not limiting itself to the provisions of the statute; it was looking at the *Brewster* indictment as well.

In fact, the holding in *Brewster* clearly implies that an indictment which on its face makes charges which are offensive to the Speech or Debate Clause may not proceed to trial. The holding of *Brewster* rejects the idea that the Speech or Debate Clause is a mere evidentiary proscription at trial which need not be addressed at the indictment stage; if it did, this Court would not have bothered to examine the language of the indictment, for it could simply have said the Speech or Debate Clause would then be satisfied by an evidentiary proscription at trial. Instead, *Brewster* includes an extended and detailed review of the indictment to show that the indictment itself did not conflict with the Speech or Debate Clause.

In short, *Brewster* is a clear holding that the indictment in that case could proceed to trial precisely because it did not charge a legislative act. Since the *Helstoski* indictment clearly does so charge, *this* indictment cannot be tried and the interests which will thereby be protected are the institutional concerns of Congress.

B. Redacting the indictment.

The prosecution cavalierly suggests that if the Court disagrees with it in its reading of *Brewster*, it should simply approve the redaction of the indictment without any attention whatever to the impact of such a procedure upon the workings of the Speech or Debate Clause.

May the indictment be redacted? May its offending portions be removed? In *Johnson,* where the Court was faced with an allegation of a specific legislative act, it did in fact allow an excision and permitted a redacted indictment to go to trial. But *Johnson,* we shall show, is fundamentally different from *Helstoski.*

It may well be that in a normal criminal case of the type referred to at Br. 96-97, n. 38, or in *United States* v. *Dowdy,* 479 F. 2d 213 (4th Cir., 1973)—which did not charge performance of a legislative act but, like *Johnson,* involved the offer of proof of a legislative act in support of a charge of performance of a non-legislative act—a surgical excision can be performed and the indictment may proceed. Not so here, where the essence of the indictment is the series of allegations as to the performance of legislative acts. Though redaction could conceivably solve Fifth Amendment indictment problems where the changes are not considered too substantial (but *cf., Ex Parte Bain,* 121 U.S. 1 (1887), and *Stirone* v. *United States,* 361 U.S. 212 (1960), discussed in our main brief, pp. 44-49), excision is not a remedy for an indictment which directly confronts the Speech or Debate Clause as does the *Helstoski* indictment.

In suggesting excision of the offending portions of the indictment, the Solicitor General ignores that the Speech or Debate Clause is designed to satisfy the institutional interests of Congress by preventing *accusations* of legislators in tribunals other than their own, where the basis of the accusation is their performance of a legislative act. That is the whole point of *Ex Parte Wason,* 4 Q.B. 573 (1869), discussed at length in the brief of *amici curiae,* pp. 40 *et seq.,* and ignored by the government. The design of the Speech or Debate Clause is to protect the legislature from pressure by the executive as

well as from pressure by the judiciary: It requires that the Clause be operative at the point where the executive moves, namely, the accusatory stage, the indictment. If the Speech or Debate Clause is not applied at the accusatory stage, then its institutional role in protecting legislators from pressure by the executive is effectively vitiated. Legislators (and Mr. Helstoski is the perfect example) know the devastating effect of an indictment on their political careers—long before the charges come to trial—and such interference with the prerogatives of the electorate is exactly what the Framers tried to prevent.

Were redactions of the indictment permitted here, a clear signal would be given to every United States Attorney that he is free to use his grand juries and their subpoena power to delve into the legislative process as he wishes. Using a grand jury, he is free to make any charge that he wishes with respect to alleged corruption, by way of alleged bribes or campaign contributions, in the introduction, evaluation, debate, or vote on any legislation in Congress. He may use the grand jury and the indictment process to a fare-thee-well, bringing the entire weight of the accusatory role of the federal government upon the hapless legislator, with no restriction upon the prosecution other than that, at trial, some of the grand jury's allegations may be struck. Whatever else that scenario describes, it is not one protecting the independence of the legislature.

The Solicitor's discussion of *Bain* and *Stirone* seems to miss the point. We are of course aware of the progeny of those cases in this Court and the Courts of Appeal, some of which are cited at Br. 96-97, n. 38. *Ford* v. *United States,* 273 U.S. 593, 602 (1927), dealt with an averment which was useless, hence innocuous. The Cir-

cuit Court decisions deal with such questions as whether a charge is being expanded or reduced, *United States* v. *Hall,* 536 F. 2d 313, 319 (10th Cir.), cert. den. 429 U.S. 919 (1976); or whether the change "affect[s] the charges brought by the grand jury in any substantial manner," *United States* v. *Crane,* 527 F. 2d 906, 912-13 (3rd Cir.), cert. den. 426 U.S. 906 (1976); whether the change is "merely a matter of form" or reflects simply the withdrawal of a charge that "the evidence does not support," or the elimination of defects "which are merely formal or technical, and which in no way prejudice defendant or alter the essential nature of the indictment," *United States* v. *Dawson,* 516 F. 2d 796, 800-802 (9th Cir.), cert. den. 423 U.S. 855 (1975); or where the language was plainly surplusage and where there is no substantial likelihood that the grand jury's indictment turned thereon, *United States* v. *Cirami,* 510 F. 2d 69, 72 (2nd Cir.), cert. den. 421 U. S. 964 (1975). None of these cases, however, deals with a change which affects *the jurisdiction of the grand jury or the court.*

In *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21 (1943), where the Court considered the availability of mandamus to correct a refusal to dismiss an indictment, it carefully noted such cases as might involve a "question of the jurisdiction of the district court," 319 U.S. at 26. Speaking of *Bain,* the Court said:

> "This is not a case like *Ex Parte Bain,* 121 U.S. 1, where the petitioner had been convicted on an indictment which, because it had been amended after it was returned by the grand jury, was thought to be 'no indictment of a grand jury.'" 319 U.S. at 26-27.

Since *Bain* was considered a case in which the jurisdiction of the district court was defeated by the amend-

ment, then surely the instant case is even more clearly one of jurisdiction.

Redacting the instant indictment to simulate the *Brewster* indictment not only ignores the fact of legislative acts being considered by the grand jury, of which more below, but in doing so purports to shift jurisdiction over the case from the House of Representatives to the District Court. The prosecution has no power to effect such jurisdictional shifts by its process of excision or redaction, not for any technical reason, not alone upon Fifth Amendment indictment considerations, but mainly because the specific objectives of the Speech or Debate Clause are frustrated by that process.

C. The grand jury's consideration of Helstoski's legislative acts.

The Solicitor General, as we noted above, at no point disputes our factual contention that at the time Mr. Helstoski appeared before the grand jury he believed his former aide was the target and that he offered no legislative materials after his request to be advised whether he was a target was refused. Neither does the Solicitor dispute that the ninth grand jury—the one which indicted Mr. Helstoski—never received any material directly from him. All the legislative material which it employed was given it by the U.S. Attorney.

The prosecution first argues that a grand jury proceeding is not "adversarial" and "arguably does not entail 'questioning' [the legislator] in violation of the Speech or Debate Clause" (Br. 98). We had thought that *Gravel* v. *United States,* 408 U.S. 606 (1972), settled the applicability of the Speech or Debate Clause to grand jury proceedings. If the legislator is the target, then, con

trary to the prosecution's statement at Br. 98, his legislative activity may not be considered by the grand jury, whether derived from the legislator himself or from any other source. In *Gravel,* it was Dr. Rodberg, not the Senator, who was the witness and the Senator merely intervened to protect his interest.[4]

On this issue this case would not be one whit different if all the bills had been presented to the grand jury from copies available in the Library of Congress and if correspondence had been obtained from the persons with whom Mr. Helstoski corresponded. It is legislative materials, however they may have been obtained, that the Speech or Debate Clause bars from consideration by the grand jury when it has set its sights on a legislator. It therefore misses the point of that Clause to say that "as long as the Congressman himself is not forced to submit to grand jury questioning, the grand jury may well be able to review evidence of legislative acts without offending the Speech or Debate Clause" (Br. 98). Such a view assumes that there is a right of grand juries to regulate the legislative process and hear testimony with respect thereto. This is precisely what the Clause prohibits, not because of the need to protect the legislator personally but because of the institutional interests of the House.

Neither does this mean that the grand jury may not consider or is not empowered to hear about legislative

[4] While in *Gravel* a Speech or Debate privilege was also recognized in respect to congressional aides, the underlying purpose of that extension was to recognize the right of the Senator. Moreover, the protective order framed by this Court "forbade questioning of *any* witness, including Rodberg" (emphasis supplied) with respect to legislative matters. 408 U.S. at 628. Additionally, in *Johnson* the proscribed evidence was not proved from the mouth of the legislator or even an aide. See *infra,* p. 43.

materials when a legislator is not the target or when legislative acts become relevant to civil litigation not involving a Member of Congress. The issue is not alone whether the legislator is the witness; the question is, what is the nature of the testimony and is the legislator the target? Is the grand jury setting itself up to question the motives of legislators or the legislative process? It is the answer to that question which establishes both the institutional interest of Congress and the right of the individual legislator.

Where the Constitution uses the word "question," it uses it in the context of accusing—charging—and not in the narrow sense of asking a question. That is certainly the import of the statement in *Kilbourn* v. *Thompson* equating the Speech or Debate Clause to the provisions of Colonial constitutions which prohibited "accusation or prosecution, action or complaint," 103 U.S. at 202.

Finally, reliance by the government on *United States* v. *Johnson,* 419 F. 2d 56 (4th Cir., 1969), is misplaced (Br. 102). In that case the sole question was whether an indictment should be dismissed on the ground that the grand jury heard evidence of legislative acts, where the only counts of the indictment which were tried made no charge of and in no way involved the performance of any legislative act.[5]

[5] It is not necessary for us to press in this case the argument that the grand jury's consideration of legislative materials voids an indictment for an offense which is wholly non-legislative in character. That is *Johnson II,* cited in the text. Without conceding that that case is correctly decided, it is clear that the case is entirely different when the product of the grand jury's consideration of these materials is clearly set forth in the indictment and the indictment plainly does charge legislative acts.

D. The *Costello-Calandra-Lawn-Blue* argument.

There is an air of insouciance about the argument from *Costello, Calandra,* and other cases (Br. 100 *et seq.*)[6] because the prosecution seems to forget that it is the Speech or Debate Clause at issue, rather than the general administration of the criminal justice system.

At Br. 99, n. 40, the Court is told:

> "If a Senator or Representative were free to challenge an indictment on the ground proposed by respondent, *virtually every indictment returned against a Member of Congress* would prompt a pretrial inquiry into whether the grand jury heard any evidence of legislative acts and, if it did, whether the amount of that evidence and its likely impact on the grand jury's deliberations were sufficient to warrant dismissal of the indictment. This is precisely the kind of pretrial proceeding that the Court's previous decisions have consistently sought to avoid." (Emphasis added.)

The Solicitor General continues with an expos ion of the general harm that may occur to the criminal process if defendants could inquire as to what went on in the grand jury room, for which he cites the *Costello* case.

How many indictments are there of Members of Congress for their legislative acts? We have been assured by the Solicitor General that they are very few (Br. 75). Does not the imperative of the Speech or Debate Clause, the need for preserving the structure of government, at

[6] *Costello -. United States,* 350 U.S. 359 (1956); *United States* v. *Calandra,* 414 U.S. 338 (1974); *United States* v. *Blue,* 384 U.S. 251 (1966); *Lawn* v. *United States,* 355 U.S. 339 (1958).

least entitle the legislator in the very few cases in which there *are* indictments to ask whether the grand jury itself breached the limitations of the Speech or Debate Clause? To set against this proposition principles applicable to the general administration of the criminal law seems absurd.

If the Speech or Debate Clause applies to grand juries, as *Gravel* settled, how is the legislator to obtain Speech or Debate relief unless he can attack the indictment which is the product of that violation of the Constitution? To be sure, he may proceed by injunctive relief, as did Senator Gravel and Congressman Eilberg, if he knows that the grand jury is proceeding against him. *In re Grand Jury Investigation,* 587 F. 2d 589 (3rd Cir., 1978). But the ninth grand jury, the one that targeted the Congressman in this case, proceeded with absolutely no knowledge on the part of Mr. Helstoski as to its undertaking. If Mr. Helstoski cannot question that grand jury's handiwork when it is plainly based on the Speech or Debate Clause, then grand juries, at least those that do not trumpet their activities, are effectively given free rein to proceed against legislators unhampered by the Speech or Debate Clause.

In our structure of government, the "checks and balances" which protect each branch are themselves to be protected from decay by the judicial branch and its ultimate oversight of the Constitution. Obviously, then, the question of whether the Speech or Debate Clause has been violated rests with this Court. The corollary of that grant of power is necessarily that the Court exercise its jurisdiction to make timely and appropriate determinations which effect the purpose of the Speech or Debate Clause.

Furthermore, there is a profound distinction between this case and those relied on by the Solicitor General. The

defendants in *Costello, Calandra, Blue,* and *Lawn* did not have a right to the setting aside of their indictments because the Court found that they had no right to object to the grand jury's consideration of the evidence in question. That conclusion was arrived at upon considerations as to the role of the grand jury in the general administration of justice. We do not believe this Court is prepared to say that the Speech or Debate Clause does not apply to grand jury proceedings and that the grand jury is entitled to set itself up to review of the legislative process—although *Johnson* and *Brewster* have prohibited this to the courts. In fact, *Gravel* clearly held that the Speech or Debate Clause does govern grand jury proceedings. Under those circumstances, the Court must apply the only remedy that is meaningful, namely, the setting aside of the product of this violation of the constitutional separation of powers.

Since the grand jury had no right to receive the evidence, the sole question is, what is the appropriate remedy where a clear proscription has been breached? The line of cases relating to a grand jury's use of immunized testimony, referred to in the brief of *amici,* pp. 37-39, and ignored in the Solicitor's brief, provides the clear answer. See, *e.g., United States* v. *Hinton,* 543 F. 2d 1002 (2nd Cir., 1977). These cases hold that an indictment obtained by a grand jury which had considered immunized testimony must be dismissed.

Significantly, this rule emerged from a statute barring the use of immunized testimony "against the witness in any criminal case," 18 U.S.C., §6002. This Court in *Kastigar* v. *United States,* 406 U.S. 441, 446 (1972), described this statute as providing "a sweeping proscription of any use, direct or indirect, of the compelled testimony." The court in *Hinton* had no difficulty in concluding that since the statute "prohibits . . . use [of immunized testimony

against a witness] not merely at trial, but in the grand jury proceedings as well," 543 F. 2d at 1009. And the remedy for breach of the statute is dismissal of the indictment.

Returning to the Speech or Debate Clause, this Court has already determined that the Clause retains its vitality in the grand jury room, *Gravel.* Certainly the language of the Constitution is at least as broad and all-inclusive in its prohibitory language as is the immunity statute. It would thus seem obvious that, whatever may be the case in respect to a grand jury's ignoring a rule of evidence (*Costello*) or a judge-created remedy for violation of Fourth Amendment rights (*Calandra*), or as relates to the workings of the Fifth Amendment (*Lawn* and *Blue*), and whatever the needs of the general administration of criminal justice, there must be an immediate remedy for a grand jury's violation of the fundamental principles of tripartite government enshrined in the Speech or Debate Clause.

E. The procedural argument: mandamus and timeliness.

We find it difficult to believe that the fundamental issues in this case could be determined by the procedural arguments presented by the Solicitor General at Br. 89.

Mandamus *is* the proper remedy here, first because the case involves the jurisdiction of the courts, recently restated by this Court as within the compass of the writ, *Will* v. *Calvert Fire Ins. Co.,* —— U.S. ——, 57 L. Ed. 2d 504 (1978). But even if that were not so, concern for the relationship between coordinate branches of the government dictates that trial, and appeal thereafter if there were to be a conviction, is not the proper way of determining fundamental constitutional questions.

In *United States* v. *Nixon*, 418 U.S. 683 (1974), this Court refused to require the President to go through the normal process of contempt and appeal after conviction as a procedure for testing the correctness of a court's ruling that he abide by a subpoena. Said the Court:

> "To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government." 418 U.S. at 691-92.

And the Department of Justice has claimed that the Attorney General is entitled to the same deference as is the President and should not be put to the process of contempt in order to test the validity of a court order[7].

Even the claim of a foreign government was considered to be a case of "such public importance and exceptional character" as to cause this Court to invoke its own mandamus jurisdiction. Since the case involved the "dignity and rights of a friendly sovereign state," it was deemed inappropriate to delay determination by relegating the foreign government to the Court of Appeals. *Ex Parte Republic of Peru*, 318 U.S. 578, 586-87 (1943).

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[7] In its brief in the Court of Appeals for the Second Circuit in *In re The Attorney General of the United States, Petitioner-Appellant, Socialist Workers Party, et al., Plaintiffs-Appellees* v. *The Attorney General, et al., Defendants-Appellants*, No. 78-6114, the government argued that the Attorney General was entitled to the same "exception to the finality rule" as was the President of the United States to avoid "an unnecessary occasion for constitutional confrontation between two branches of the government." The government argued that "the Supreme Court's decision in *Nixon* provides an avenue for avoiding a protracted confrontation between two branches of government which is both unseemly and unnecessary.

The Congress of the United States is entitled to no less consideration than is the President, the Attorney General, or a foreign government. The Solicitor General makes the familiar argument that Mr. Helstoski can only have a review of the denial of the motion to dismiss if he is convicted and the Solicitor contends that this is required by the Court's frequently stated policy against interlocutory consideration of pretrial orders in criminal cases. That policy, designed to prevent interference with the "orderly progress" of a proceeding, *Cobbledick* v. *United States*, 309 U.S. 323, 329, n. 6 (1940), can hardly apply here.

The prosecution's arguments on this point plainly have no merit in light of what this Court has said as to Members of Congress being entitled to relief "from the burden of defending themselves," *Powell* v. *McCormack*, 395 U.S. 486, 505 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967), and to an "expeditious treatment" of a motion to dismiss, *Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S. at 551, n. 17.

The trial of this case has been postponed not by Mr. Helstoski but rather by the prosecution. The issue raised by the mandamus petition has in no way contributed to any delay in the prosecution of this case. While the Court of Appeals ultimately denied the petition for mandamus, it ordered the case briefed together with the government's appeal and decided them together. To address this case, then, in terms of a policy of not interfering with the normal course of a trial seems quite wide of the mark.

Finally, we believe that suggestions of untimeliness, and that petitioner should have predicted the outcome of *Abney* v. *United States*, 431 U.S. 651 (1977), and should earlier have filed an interlocutory appeal,[8] are quite mis-

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[8] The government carefully avoids conceding that *Abney* would have been applicable to this case (Br. 92), and a later decision, *United States* v. *MacDonald*, 435 U.S. 850 (1978), has emphasized that *Abney* has its limitations.

placed. What was filed was a petition for a writ of mandamus/prohibition and that was clearly justified. We know of no specific time limit upon such a proceeding and it was filed at a time when it in no way delayed the proceedings.

Perhaps counsel for Mr. Helstoski might have simultaneously filed an interlocutory appeal and a mandamus to avoid the responsibility of predicting the procedural form which might be effective in this uncertain area of appellate jurisdiction. Indeed, that is what Attorney General Bell did when faced with an order of contempt for refusing to abide by a district court order. As it developed, the Court of Appeals for the Second Circuit in its decision rendered on March 19, 1979, in the case referred to *supra,* n. 5, ruled that interolcutory appeal was improper. The court refused to apply the Nixon exception to the Attorney General for that purpose. It then held that mandamus, the remedy chosen by counsel for Mr. Helstoski in this case, was appropriate for the Attorney General's case. Significantly, a major consideration mentioned by the Second Circuit, in sustaining the appropriateness of mandamus, was the importance of the separation of powers.[9]

Counsel chose mandamus rather than interlocutory appeal because of his awareness of the particularly restric-

[9] "We cannot ignore the fact that a contempt citation imposed on the Attorney General in his official capacity has greater public importance, with separation of powers overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant."

The above opinion was rendered two days before this brief went to press and counsel does not have a printed slip sheet opinion. The foregoing appears at p. 12 of the typewritten copy of the filed opinion.

tive view taken by this Court in respect to interlocutory appeals in criminal cases. In view of the important Speech or Debate aspects of the case, as well as its jurisdictional implications, mandamus appeared to be the more appropriate remedy.

Moreover, counsel pointed out to the Court of Appeals in the mandamus petition that the very reason for the sharp restriction of interlocutory appeals in normal criminal cases, namely, the avoidance of "piecemeal" appeals, *Cobbledick, supra,* 309 U.S. at 325, called for the issuance of the writ in this case. The prosecution had already filed an interlocutory appeal, it had already delayed the case, and the issue it was presenting to the Court of Appeals involved the evidentiary implications of the Speech or Debate Clause. Thus, *not* to grant the petition, so that the court could at the same time consider the indictment or jurisdictional implications of the Speech or Debate Clause would have amounted to a judicial insistence on piecemeal appeals despite the fact that the issues "for practical purposes [presented] a single controversy," *ibid.*,[10] a consideration which, aside from separation of powers concerns, should have prompted the lower court to determine this matter on the petition for writ of mandamus. We are not necessarily arguing that every time a Member of Congress is prosecuted he is entitled to an interlocutory appeal or mandamus if he raises substantial and non-frivolous defense issues, even though that might well be an appropriate

[10] We are not suggesting that the fact that the prosecution filed an interlocutory appeal opened the door to any and all appellate issues in this case. The mandamus petition was specifically limited to Speech or Debate issues and did not include other appellate issues which were in fact ripe for review, *e.g.,* Mr. Helstoski's motion to dismiss the indictment because of the use of multiple grand juries (see opinion of Judge Meanor denying that motion, Pet. No. 78-546, 9a).

rule. We do, however, say that where the prosecution has taken an interlocutory appeal which seeks review of Speech or Debate issues, then the refusal to accept mandamus to consider related Speech or Debate issues amounts to that "leaden-footed" administration of justice previously criticized by *this* Court, *Cobbledick, ibid.*

Whatever the form of the requested relief—interlocutory appeal or mandamus—the question for the Circuit Court was whether it would exercise its powers to prevent both a serious attack upon the separation of powers and a piecemeal approach to the appellate issues, which were but two facets of the same underlying constitutional question. The prosecution's argument on these issues and the refusal of the Circuit Court to deal with the issues in the mandamus petition simply cannot be squared with this Court's assurance of an "expeditious treatment" of a motion to dismiss in a case which presents serious Speech or Debate confrontations, *Eastland, supra,* 421 U.S. at 551, n. 17.

PART II

The Evidentiary Issues

(Introduction)

Johnson holds that in a criminal prosecution of a Member of Congress his legislative acts may not be used as evidence against him even though the prosecution is for the performance of a non-legislative act. *Johnson* explicitly rejected the contention there presented by the government that the Speech or Debate Cluase protected only against prosecution for the doing or content of a legislative act itself. And just as explicitly, the Johnson ruling was reaffirmed by *Brewster*:

> "Our holding in *Johnson* precludes any showing of how he acted, voted, or decided." 408 U.S. at 527.

Despite the foregoing, the government presents two theories under which it should be permitted to prove legislative acts in this case:

a) Where a Congressman is charged with conduct not encompassed within the Speech or Debate Clause, the government should be permitted to prove his legislative acts in support of that charge, provided it does so by proof of acts and statements "that are not part of the legislative process even if one or more of them refers to a past legislative act" (Br. 28). In other words, so the Solicitor General argues, the legislative process and legislative acts may be implicated in the trial because the Speech or Debate Clause addresses only the form of proof of legislative acts, not the substance.

b) §201 is a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the con-

duct of its Members (Br. 28) and under that statute Congress has effectively delegated to the courts its power to discipline its Members.

We shall deal with the second argument later in this brief; at this point we focus on the first contention. But before we deal with that contention in detail, we believe it appropriate to set forth exactly what the government is driving at as applied to this case.

The government analyzes the evidence of legislative acts into three categories:

a) The immigration bills themselves (Br. 43);

b) Correspondence between Mr. Helstoski and others which would show that bills were introduced and how they progressed in the House, particularly the Immigration Subcommittee of the House Judiciary Committee, including requests for supporting information to establish the hardship necessary for favorable action on the bills (Br. 44);

c) Testimony by persons for whom bills were introduced which would effectively show that bills were in fact introduced on their behalf (*ibid.*).

The prosecution seems to concede that, absent waiver, the immigration bills are inadmissible (Br. 64). Again, absent waiver, it acknowledges the inadmissibility of grand jury testimony by Mr. Helstoski describing his introduction of such bills (Br. 65, n. 26). The prosecution also concedes that such correspondence as entailed the Congressman's seeking information to support a bill might also be barred. By reasoning that is hardly clear, the prosecution argues that other evidence which proves the introduction of bills, such as conversations and letters, is admissible. The only statement by the government as to a distinction among these forms of evidence is that it

> ". . . wishes to use the letters not to show the occurrence of any legislative acts, but to show respondent's role in a scheme to introduce private bills in return for payment." (Br. 66)

Aside from the fact that this argument, in similar form[11] was made and rejected in *Johnson*, it should be recognized that the government apparently concedes that it may not prove legislative acts from official sources but may do so if it finds an indirect or unofficial form of proof. The decision of the District Court and the Court of Appeals was that legislative acts could not be proved and that, as stated by the Court of Appeals:

> "To allow a showing [of past legislative acts] by such secondary evidence would render *Brewster's* absolute prohibition meaningless." (Pet. No. 78-349, 28a.)

It is the Solicitor General's position that the testimony of his witnesses as to Mr. Helstoski's statements regarding the introduction of legislation "would not be offered for the purpose of showing the performance of a legislative act" but rather would "tend to show the existence of the illegal bribery scheme charged in the indictment, whether or not any legislative acts were in fact performed" (Br. 63). In short, he repeats the argument, rejected below,

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[11] Said the Department of Justice in its brief in *Johnson*, submitted to this Court (p. 6):

> "While this purpose requires the immunization of legislators from liability founded upon the content of their official speech, it does not justify immunity from prosecution for the antecedent unlawful act of taking a bribe to make a speech in Congress—an act which is an offense whether or not the speech is ever given."

that legislative acts are probative, not of themselves, but of "knowledge and intent," *ibid.*, and may be offered for that purpose without the act itself being proved and thus put at issue. It is an argument of so little weight, however, that the Solicitor himself provides the reply, only pages before:

> "While the statement 'I will introduce your bill tomorrow' may be somewhat less probative of the fact of introduction of the bill than the statement 'I introduced your bill yesterday,' both statements tend to prove the performance of a legislative act." (Br. 60)

And earlier:

> "While the first kind of evidence may be slightly more probative of the actual performance of a legislative act than the second, both circumstantially indicate to the jury that the acts mentioned have occurred . . ." (Br. 18)

Clearly, the prosecution knows that what it is trying to do, in introducing evidence of the performance of legislative acts, is to prove those acts. The devious argument that a jury can be told the acts are introduced to show knowledge or intent, motivation, or any of a number of things, cannot hide the fact that it is the acts which are being proved and in such fashion as to amount directly to an "inquiry into the legislative performance itself" (*Brewster,* 408 U.S. at 527), which this Court has forbidden.

I. The Solicitor General is effectively seeking to have this Court overrule *Johnson* and *Brewster.*

A. The prosecution's erroneous reading of Johnson (Br. 45-52).

In support of its argument that the categories of evidence it seeks to introduce (whether to prove legislative acts or to prove "intent or knowledge") are admissible, the prosecution develops an argument that it is the form in which those acts are proved that is controlling. But *Johnson* and *Brewster* establish that in a prosecution of a legislator for criminal conduct, his legislative acts may not be used as evidence against him and those cases, as we shall show, equally establish that *the form of the proof of legislative acts is irrelevant.*

The surprising feature of the government's argument on this score is that in its efforts to avoid the clear holdings of this Court, it repeats at this time, almost in the same words, some of the arguments it made in *Johnson* which were explicitly rejected by the Court.

The heading of the prosecution's Point A(1) (Br. 29) reads as follows:

> "1. The history of the Speech or Debate Clause indicates that the Clause is not concerned with evidentiary references to past legislative acts, but rather is designed to preclude inquiry by the executive and judicial branches into the substance of legislative activity."

Underlying the argument that the form of proof of legislative acts is important is the government's reversion to its *Johnson* argument that the Speech or Debate Clause was concerned only with prosecutions for the content of a legislative act. If it could only establish that, then its

next argument would flow more easily: namely, that the *Johnson* and *Brewster* holdings are technical evidentiary rulings easily overcome by changing the manner in which legislative acts are proved. Therefore, the government repeats in slightly different words the argument made by it and rejected by the Court in Johnson.[12] Throughout the *Johnson* brief the government argued that the Speech or Debate Clause functions merely to protect legislators from liability founded upon "the content of their official speech" (pp. 8, 9, 10). The government acknowledged that Johnson's speech had itself been proved but insisted that it had offered no testimony concerning the "content or the giving of the speech" (p. 16). During oral argument, counsel for the government emphasized that the content of the speech was not relied on by the government.[12a]

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[12] Points I(A) and (B) of the government's brief in *Johnson* are entitled:

> "A. The rationale of the speech or debate clause bars liability founded on the content of a legislative speech but does not bar liability based on an antecedent corrupt agreement.
> B. The English background sustains the view that the privilege of free speech and debate was designed to protect the content of speech, not the antecedent act of accepting a bribe."

[12a] See transcript of the government's oral presentation in *Johnson*, to be lodged with the Clerk of the Court.

Johnson was argued before the practice was adopted of routinely transcribing all oral arguments. The only record of that argument is a tape recording in the National Archives. Because counsel concluded, after listening to that tape recording, that some statements appearing theren were of special importance to the instant case, he is causing the tape recording to be transcribed and it will be lodged with the Clerk. By reason of the press of time the transcription has not as of the filing of this brief been completed. When it is lodged with the Clerk it will be accompanied with a Memorandum identifying the pages in the transcript which sustain the references to it in this brief.

This Court described the argument and its reaction to it as follows:

> "The Government argues that the Clause was meant to prevent only prosecutions based upon the 'content' of speech, such as libel actions, but not those founded on 'the antecedent unlawful conduct of accepting or agreeing to accept a bribe.'" 382 U.S. at 182.

The Court specifically rejected that argument, pointing out that historically, even in England, it was not so limited "and the language of the Constitution is framed in the broadest terms," *id.* at 182-83. It held that the Clause barred proof of a speech having been made on the floor of Congress in support of a charge of defrauding the government, even though the content of the speech did not figure in the prosecution. The Court made clear that its decision prohibiting proof of legislative acts did not prohibit a prosecution which "does not draw in question the legislative acts of [a] member of Congress or his motives for performing them," *id.* at 185. But proof of the legislative acts which, as the Court explained, necessarily opened up such questions as "who first decided that a speech was desirable, who prepared it, and what [the] motives were for making it" presented inquiry which "necessarily contravenes the Speech or Debate Clause." *Id.* at 184-85.

It is remarkable that, with minor variations, the government repeats in its current brief much the same arguments as were developed in *Johnson,* all in support of a theory that this Court has already rejected, namely, that the Speech or Debate Clause protects only prosecutions directed at the content of the speech.

Having reargued the "content of speech" point, the government then moves to what it considers to be its main

contention, that since U.S. legislators are subject to prosecution for soliciting or receiving bribes, the Court should not "impose evidentiary restrictions" that in the government's view obstruct the prosecutorial process and "do little to further the constitutional goal of legislative independence" (Br. 42). Obviously, if the government could convince the Court to depart from its holding in *Johnson* that the Speech or Debate Clause is not limited to prosecution for the content of the speech, it would stand a better chance of persuading the Court that the evidentiary proscriptions of *Johnson* are but minor technical limitations easily circumvented and sacrificed to the government's claim of prosecutorial need.

There follows a discussion of the *Johnson* case (Br. 45-52) which plainly misstates the holding of that case. The misstatement is evident in two independent but significant areas:

a) The government says: "The Court in *Johnson* disapproved a criminal charge that could *only* be substantiated through detailed questioning about a particular legislative act" (Br. 50, emphasis supplied) and the government then seeks to distinguish *Johnson* because in this case, so it argues, "proof of a legislative act and the motivation therefor" is not necessary to establish the offense (Br. 51).

Nothing could be a more distorted reading of *Johnson* as it applies to the instant case. Plainly, the *Johnson* prosecution did not *require* proof of legislative acts. The gravamen of that prosecution was Johnson's intervention with the executive branch on behalf of those who bribed him. When the Court remanded that case for retrial "purged of elements offensive to the Speech or Debate Clause," 383 U.S. at 185, the retrial could proceed, because in the original trial the government had introduced proof

of legislative acts in a prosecution which did not require such proof.

Accordingly, were the government's statement true that "Proof of the bribery charges against respondent [in this case] does not require evidence that respondent introduced a private immigration bill or performed any other legislative act," it would describe a situation in no way different from that in *Johnson,* where such proofs were not allowed. In fact, the indictment in this case, even if not the statute upon which it is based, does require proof of the legislative acts if the trial is to be of the indictment which was returned. See discussion in our main brief (pp. 41-42).

It is clear that the *Johnson* Court was not concerned with what was *required* to be proved to convict Johnson. The entire thrust of that opinion is directed at what was *in fact* proved and the manner in which such proofs put the legislative process on trial.

b) In its second misstatement, the prosecution says (Br. 51):

> "The concern of the Court in *Johnson* . . . was with accusations and trials that call legislators to account for what they have done in Congress . . . Johnson found fault not with a simple showing that a Congressman gave a speech, but with the government's attempt to impose criminal liability on the basis of that act and to question the Congressman and others about the act's background and motivation."

It is not possible to read the government's brief in *Johnson,* or the transcript of the oral argument before this Court in that case, or the Court's opinion per Mr. Justice Harlan, and still describe the *Johnson* case in the foregoing terms. As we pointed out above (pp. 34-35),

the government in arguing *Johnson* repeatedly and persistently contended that Johnson was being prosecuted not for what he said but for taking money. It was the Court, moreover, which pointed out that if in the course of such a prosecution the government actually proved his legislative conduct then the trial actually became a review of the legislative process and of legislative motivation, regardless of what the government claimed it was doing.

The ruling in *Johnson* flowed inevitably from the essential differences between the Speech or Debate Clause in our country and in England. In England, where the Clause provides a personal privilege, the *Johnson* issue could not arise because the courts there simply have no power to prosecute a legislator for any misdeeds. Parliament retained the sole right to prosecute a legislator whether he was charged with legislative or non-legislative conduct. But in this country, the Clause from the beginning has applied only to legislative conduct. That is why an issue could arise as to the permissbility of proof of legislative acts where the prosecution was for non-legislative acts—and that was the *Johnson* case.

When it rejected the government's argument in *Johnson* that the Speech or Debate Clause applied only to prosecutions for the content of speech, this Court did so in the context of its recitation of the purposes of that constitutional provision. It emphasized the specific functions of the Speech or Debate Clause as protecting "the independence and integrity of the legislature" and reinforcing "the separation of powers." 383 U.S. at 198. The opinion significantly quotes from *Tenney* v. *Brandhove,* 341 U.S. 367 (1951), approving its reference to Chief Justice Marshall's opinion in *Fletcher* v. *Peck,* 6 Cranch 87 (1808):

> "It is not consonant with our scheme of government for a court to inquire into the motives of legislators."

Analyzing the evidence of legislative acts in *Johnson,* Mr. Justice Harlan pointed out:

> "It was undisputed that Johnson delivered the speech; it was likewise undisputed that Johnson received the funds; controversy centered upon questions of who first decided that a speech was desirable, who prepared it, and what Johnson's motives were for making it." 383 U.S. at 184.

Earlier, Mr. Justice Harlan had stated:

> "Johnson's defense quite naturally was that his remarks were no different from the usual congressional speech, and to rebut the prosecution's case he introduced speeches of several other Congressmen speaking to the same general subject, argued that his talk was occasioned by an unfair attack upon savings and loan associations in a Washington, D.C., newspaper, and asserted that the subject matter of the speech dealt with a topic of concern to his State and to his constituents." 383 U.S. at 177.

The particular vice of proving legislative acts in a prosecution of a legislator is that such proof inevitably requires an inquiry into the motives of the legislator. If the government proves the receipt of money and the performance of a legislative act and seeks to connect the two, then the defense must necessarily seek to establish, just as Johnson did, that the legislative act was sound and was motivated by considerations other than the alleged bribe—considerations which may involve the Congressman's personal perceptions of social policy or the desires of constituents who may have political clout, recognition of which is certainly not corrupt. In other words, the only defense to a charge that a certain act was corruptly motivated is to show a

non-corrupt motivation—to explain, for example, the need for the introduction of a certain bill, the agreement of other legislators that the bill ought to be introduced, constituent desire for such a bill, etc.; in short, all those matters which should be explained to the electorate and not the courts.

After reviewing the record of the *Johnson* case and pointing out that it took exactly the foregoing course, Mr. Justice Harlan says:

> "We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it." 383 U.S. at 177.

And such a judicial inquiry under a Section 201 prosecution would have precisely the same effect.

If the government in a trial of the *Helstoski* case proves his legislative acts, Mr. Helstoski—like Johnson—will have no choice but to prove that he and many other Members of Congress have introduced similar legislation. He will have to show that each bill which he is charged with having introduced was justified and properly motivated. He will prove the processes of the House Judiciary Committee in reviewing all private immigration legislation which is introduced.[13] He will prove, as outlined in the *amicus*

[13] In the course of this, he will undoubtedly correct the misleading and exaggerated misstatements of the impact of the introduction of a private immigration bill which appear in the footnote to p. 43 of the prosecution's brief.

(Footnote continued on following page)

brief submitted by the Speaker (pp. 51-57), the special and unique significance of private legislation as providing legitimate justification for the particular bills he introduced.

In short, the legislative process in respect to the bills at issue would inevitably be put on trial and, in the end, a jury would have to decide whether the defendant's account of his motives for introducing a bill were convincing, whether the bill in fact ought to have been introduced, or whether the bill was introduced with corrupt motivation. The jury thus would find itself square in the middle of the legislative process, deciding which bills were properly introduced and which were not. Such a prospect is precisely what has been understood, since the days of Chief Justice Marshall, to be impermissible.

Thus, the *Helstoski* case, if pursued as the prosecution would like, would inevitably present the kind of "intrusive judicial inquiry" into legislative proceedings and the motives therefor which Mr. Justice Harlan said "violates the express language of the Constitution and the policies which underlie it," 383 U.S. at 177.

An incisive question by Mr. Justice Harlan in the course of oral argument in the *Johnson* case makes clear that undertaking to prove the legislative process and to question the reasons for particular legislative conduct inevi-

(Footnote continued from preceding page)

For a more correct exposition, see 2 *Immigration Law and Procedure*, Gorden & Rosenfield, §7.12 (Matthew Bender, 1978, Rev. ed.). This text has frequently been cited by this Court, *Reid* v. *Immigration & Naturalization Service*, 420 U.S. 619, 622, n. 2 (1975); *Saxbe* v. *Bustos*, 419 U.S. 65, 71, n. 12 (1974); *Woodby* v. *Immigration & Naturalization Service*, 385 U.S. 276, 278, n. 2 (1966).

tably puts the Court in the position of impugning the legislative process. Counsel for the government was arguing that the government was prosecuting the receipt of a bribe, not the performance of a legislative act. But Mr. Justice Harlan interjected:

> "How can you impugn a speech more than by saying it is the result of a bribe?" (Transcript of oral argument lodged with the Clerk, *supra,* note 12a.)

There is no way of permitting legislative acts for whatever purpose—restricted or general to be introduced—in the trial of a legislator, for taking a bribe for having performed a legislative act, without inquiring into the motives of the legislator. There is no way of putting in issue the motives of the legislator without anticipating that he will respond by putting in evidence his own and his colleagues' legislative activities to show they were not corruptly motivated. In short, there is no way of presenting proof of legislative acts in the trial of a legislator without putting the courts in the position of questioning and impugning the entire legislative process—exactly what our courts have refused to do since *Fletcher* v. *Peck, supra.*

So viewed, it is plain that it is wholly irrelevant how legislative acts are proved—whether by copies of the *Congressional Record* or by correspondence or by conversations. It is equally irrelevant that the prosecution says it is seeking to prove one thing rather than the other. *Johnson* was not a technical evidentiary determination; the *Johnson* evidentiary determination dealt with the most fundamental aspects of separation of powers and the allocation of functions between the legislative and the judiciary. In whatever manner the legislative act is proved, the legislator is immediately challenged to prove that his legislative conduct was not corruptly motivated. This

necessarily places before a court and jury questions which are not for them to decide.

Questions as to the form of proof actually came up in *Johnson* and the Court decided that the controlling factor must be the fact of proof and not the form by which legislative acts were proven.

It will be recalled that the legislative act—the speech—in the *Johnson* case was proved, in part at least, by a reprint of the speech. Government counsel in the course of oral argument emphasized that, as distributed, the speech was different from that which was given because the title of the speech had been changed.[14] Beyond that, government counsel conceded that the record included testimony by an individual who stated that Congressman Johnson told him he had made a speech on the floor—*exactly the kind of testimony the government seeks to introduce here.*[15]

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[14] One Justice (unidentified in the tape recording) pinpointed this. After counsel for the government emphasized that "The caption on the speech was not the caption on the speech as it is recorded in the *Congressional Record,*" the following colloquy enusued:

> A Justice: "Are you drawing a distinction that if you used a copy of the speech delivered to the clerk and printed in the *Congressional Record* that that might have offended the constitutional protection? Is that what you are saying?"
>
> Government Counsel: "Im saying it tends to prove—I think it is a fact that we didn't rely on the speech as given." (*Johnson* oral argument, transcript to be lodged with the Clerk.)

[15] "There is in the record evidence that a reporter from the *Washington Post* talked to respondent in December of '61, which was before the indictment was given, and asked him both about representations before the Department of Justice and the representations and the speech and the government affirmatively did put on that reporter who said that respondent told him in 1961 that he made the speech because a constituent asked him to." (*Johnson,* oral argument, transcript to be lodged with the Clerk).

A brief comment by this Court at fn. 14 of its opinion in *Johnson* effectively disposes of the argument that the form of the proof of the legislative act mattered:

> "The use of a copy of the speech in this context necessarily required the jury to read those portions and to reflect upon its substance." 383 U.S. at 184.

It is thus clear that the evidentiary principles laid down by *Johnson* are wholly unaffected by the form of proofs of legislative acts and that in *Johnson* the Court had before it, and rejected, precisely the argument that the prosecution here presents again, namely, that the legislative acts are admissible if they are proved by evidence which did not itself constitute a legislative act, *e.g.,* a speech reprint or an oral conversation by the Congressman.

B. The Solicitor General's criticism of *Brewster*.

Brewster of course reinforced and reiterated *Johnson.* As this Court said:

> "[O]ur holding in *Johnson* precludes *any* showing of how he acted, voted, or decided.
>
> • • •
>
> "These [legislative acts' we *all* agree are protected acts that cannot be shown." 408 U.S. at 527-28 (emphasis added).

There is no question but that the District and Circuit Courts adhered strictly to the teachings of *Brewster.* The Solicitor General does not deny that the lower courts followed *Brewster;* but the Solicitor General thinks the *Brewster* decision is illogical, that this Court did not really mean what it said in that case. Thus, the primary thrust of the Solicitor's argument is that the Court should

depart from its *Brewster* opinion. A secondary thrust of the Solicitor's argument in relation to *Brewster* posits hypothetical assumptions as to what the evidence in this case may become—assumptions which are strenuously disputed by Mr. Helstoski—and he plainly misstates what the District Court said about those assumptions.

C. The argument that the *Brewster* decision is illogical.

Brewster, as we explained above (*supra,* p. 9) involved a claim that a Senator had received money upon a general promise to serve the briber in respect to legislative activities. While reaffirming *Johnson,* the Court held that the *Brewster* prosecution could proceed with the government barred from proving that Brewster had performed a legislative act. The government could prove that Brewster had taken money; it could prove that he had made a promise generally to perform legislative acts; it simply could not prove that legislative acts had been performed. So to do would bring the case back to precisely the situation in Johnson. It would force Senator Brewster to defend himself by proving the legitimacy of his legislative activities, and thereby put the legislative process on trial before the court.

Thus, the Court says:

> "To make a *prima facie* case under this indictment, the government need not show any act of [Brewster] subsequent to the corrupt promise for payment, for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act." (408 U.S. at 576 (emphasis in original).

This distinction between the promise to perform legislative acts and the actual performance of such acts is the

very essence of *Brewster*. It meant that *Johnson's* strictures against trying the legislative process within the courts would be fully enforced, while corrupt agreements which could be established without proof of legislative acts could be prosecuted.[16]

The Solicitor claims some ambiguity in the Court's holding that "*Johnson* precludes any showing of how [Brewster] acted, voted, or decided," 408 U.S. at 527 (Br. 55) and that those words may be interpreted to mean that evidence of the performance of legislative acts is in fact admissible. The Solicitor argues that "The contrary rule, advocated by respondent and adopted by the courts below, would produce absurd results" (Br. 56). Continuing the Solicitor says, "The district court and Court of Appeals . . . have injected a peculiar temporal element into the set of considerations relevant to the admissibility of evidence under the Speech or Debate Clause" (Br. 60). And finally he says, "The source of this past-future distinction is unclear (*ibid.*) and, in his view, has "logical flaws" (Br. 61).

The "past-future distinction" is of course precisely delineated in *Brewster* and this Court rendered a decision that could hardly be termed illogical. Far from being illogical or absurd, *Brewster* is a carefully drawn decision

[16] The Solicitor General's brief (Br. 54-55) completely misses the issue when it suggests that the Court in *Brewster* was recognizing a difference between the kinds of proof "necessary to sustain the indictment in *Johnson*, on the one hand, and *Brewster*, on the other." *Johnson* never dealt with what evidence was necessary to sustain the *Johnson* indictment. The Court there decided that particular evidence that had actually been admitted at the trial should not have been allowed. In *Brewster*, in a decision pretrial, the Court decided that the kind of evidence that had been proved in *Johnson*—legislative acts—could not be proved in *Brewster* either, but that such proof was not necessary for that indictment.

which distinguishes the promise to perform as a general agent in the Congress for a consideration—a set of circumstances which does not require proof of legislative acts —from the actual performance of such acts, recognizing that proof of the latter inevitably puts the legislative process on trial.[17]

To be sure, the Court's decision in *Brewster* evoked vigorous dissent from three of its members who argued for a far more stringent application of the Speech or Debate Clause, one that would have barred proof of a promise to perform legislative acts even in general terms *in futuro*. But no member of the Court—we repeat, not a single member of the Court—supported casting aside *Johnson* by permitting proof of the past performance of legislative acts as evidence against a Member of Congress. While the government may take a cavalier attitude toward trying the legislative process in federal courts, we doubt

[17] The Solicitor general assumes that *Brewster* draws the line between a promise to perform a specific act in the future and the performance of such act in the past. Even if *Brewster* is read that way the decision below must be affirmed, for the District Court merely prohibited proof of the past performance of a legislative act.

We believe that the relevant evidentiary distinction to be drawn from *Brewster* may not be the distinction between corrupt acts done in the past and those that may be done in the future, but rather between the promise to act as a general agent as opposed to the legislative act itself whether in the past or the future. While the *Brewster* indictment said that the Senator had promised to and had performed acts in general, those acts were never specified. Hence that case could be tried on the theory that the Senator was a general agent, not that he had performed or promised to perform any specific act. While some language in the courts *Brewster* opinion suggests that the court would also include within Section 201 promise to perform a specific bill (408 U.S. at 526-527) that certainly was not the holding of the case and was not involved in the indictment.

that this Court is prepared to depart from Mr. Justice Harlan's analysis in the *Johnson* opinion and allow federal courts and juries to become mired in the quicksand of determining the reasons for introducing a particular piece of legislation, or the motives of a legislator in calling for committee hearings. For it is that which is the inexorable consequence of proving legislative acts before a jury, and as our analysis of *Johnson* shows, it would not matter whether those legislative acts are proved by certified copies of the *Congressional Record* or by proof of an oral conversation that establishes the performance of a legislative act.

The government's quarrel with *Brewster's* temporal distinction is not with the District Court or the Court of Appeals, but with this Court.

That the *Brewster* decision did not prohibit the prosecution of legislators for the taking of bribes is no more clearly established than by the subsequent history of that case. The Senator was in fact prosecuted and convicted and it is clear that the proofs in that case did not involve any evidence of the performance of legislative acts. See *United States* v. *Brewster,* 506 F. 2d 62 (D.C. Cir. 1974). In that prosecution the proofs of the taking of money and the promise to perform legislative acts in general were strong enough that they could go to the jury without having to be corroborated by proof of legislative acts. Thus, the *Brewster* trial proceeded without putting the legislative process to trial.

The government's real problem here is that the *Helstoski* case, in contrast with *Brewster,* is based upon entirely uncorroborated testimony of two persons who claim to have made payments of cash for legislative acts. The truth of the matter is that here the prosecution's case is so thin,

so lacking in either direct or circumstantial evidence, and so utterly dependent on the unsupported testimony of two persons who are demonstrably untrustworthy, that it wishes to make its case more plausible and its witnesses more credible by introducing massive amounts of correspondence showing that Mr. Helstoski engaged in the legislative activity which it claims was purchased. It seems to be the prosecution's theory that if it can show the legislative acts took place, it will have less trouble convincing a jury that the acts were paid for. This may well be true; it is, however, no justification for allowing the prosecution to proceed in this manner. The trial would, on the prosecution's scenario, become a review before a jury of what took place, in committee and on the floor of the House—exactly what the Speech or Debate Clause was designed to prevent. That is too dear a price to pay to purchase credibility for those whom the prosecution has caught engaging in criminal activity.

If the alleged corruption of a Member of Congress can be proved only by reference to his performance of legislative duties, then that case of corruption is a matter for the Congress of the United States, for in such a case what is being tried is not the corruption of a legislator but the corruption of the legislative process. In the *Brewster* case, it was clear, and relatively easy to prove, that Brewster had been put on the payroll of the Spiegel Company to use his influence in respect to whatever might come before him, in the course of his Senatorial duties, regarding postal rate legislation. The corrupt Member of Congress could be, and was, tried without reference to any *particular* legislative act he performed on account of the yearly retainer he received from Spiegel. That was clearly a case the executive could try. But in this case the prosecution is claiming, that on several occasions he

undertook specific and identified legislative acts in return for certain amounts of money. The prosecution, in short, wishes to show that specific legislative acts were "bought." This sort of inquiry is most assuredly *not* the business of the executive branch or of the judiciary, as the Speech or Debate Clause and its glosses in *Johnson* and *Brewster* make clear. If the prosecution's case, as it appears to be, is that the introduction of bills was purchased, then, in both the accusation and prosecution of the case, it has intruded upon matters which are solely within the jurisdiction of Congress.

D. The request for a remand.

Because, unlike *Johnson,* this case comes up before trial, there is no record of actual testimony. Before instituting its appeal, however, the prosecution sought to procure pretrial determinations of proffered proofs, and the District Court Judge declined to do so (Pet. No. 78-349, 59a).[18] On August 3, 1978, after the Court of Appeals had ruled but before the petition for certiorari was filed in this Court, the government renewed its motion in the District Court and sought again to have the court make evidentiary rulings. The proceedings of August 3 are not part of the record in this case. Nevertheless, because, as we pointed out above (*supra,* p. 7), there are significant distortions in the government's brief as to what transpired on that day, we have lodged with the Clerk of the Court a copy of the transcript of the proceedings on that day.

[18] As appears from the Special Appendix filed by Mr. Helstoski, we sharply dispute whether the witnesses would even testify in accordance with the prosecution's claims, let alone whether, if they did so testify, it would be truthful.

This misstatement by the prosecution bears on its suggestion that the case be remanded to the District Court for a minute determination in advance of the trial as to the admissibility and extent of necessary redaction[19] of each letter sought to be introduced. That suggestion is absurd. Twice the District Court declined to do that, for the obvious reason that questions as to whether a particular piece of evidence does or does not indicate the performance of a legislative act or whether a particular document has been sufficiently redacted to eliminate such an indication, plainly cannot be decided in a vacuum. Admissibility must be determined in the context of the testimony and evidence adduced at trial. Moreover, a remand to the District Court for detailed pretrial evidentiary rulings would be tantamount to exercising an unprecedented supervisory mandamus to reverse the District Court's refusals to make such rulings. And dragging out this prosecution by such a procedure, including the potential for more interlocutory appeals under 18 U.S.C., §3731, is hardly consistent with minimizing interference with the legislative and the criminal processes.

E. The argument from "policy considerations".

Since the prosecution is essentially arguing that it should be permitted to prove legislative acts provided it does so indirectly rather than directly, its so-called policy arguments basically amount to a plea that this

[19] Curiously, at a proceeding on February 14, 1977, when this matter was discussed, the Assistant U.S. Attorney said, "I must tell you quite candidly the redaction in terms of this correspondence would not be feasible." C.A. App., Vol. II, 342.

Court should cooperate in an undermining of the Speech or Debate Clause. The Court is specifically asked to balance the interests of Congress against the supposed needs of the government for the sought-after evidentiary material. On the challenged premise that bribery in fact occurred, the Solicitor General asks this Court to put expediency above the Constitution.

The short answer to this argument is that the Speech or Debate Clause provides an "absolute bar" to the use of judicial power and is not subject to the balancing approach. As recently as March 20, 1979, this Court decided that "Balancing . . . is impossible" when dealing with specific constitutional prohibitions. *New Jersey* v. *Portach,* opinion per Mr. Justice Stewart, slip opinion p. 9. In any event, that balance was struck almost two centuries ago, and in terms of absolute constitutional immunity. In its most recent expression in this field, *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975), the Court overruled a lower court opinion which in fact had "balanced" the rights of individuals against the rights established by the Speech or Debate Clause. The Court stressed that today, as in the days of the Framers, "the prohibitions of the Speech or Debate Clause are absolute," *supra,* at 501. Repeatedly, this Court used the term "absolute" in describing rights under the Speech or Debate Clause, *id.* at 501, 503, 509. This Court made it clear that a balancing analysis was inappropriate in determining the application of the Speech or Debate Clause, *id.* at 509, n. 16.

Beyond that, the prosecution's argument in its successive points is flawed at every stage:

a) Contrary to the prosecution's argument, the evidentiary force of the Speech or Debate Clause is not "judicial creation" of an "evidentiary privilege" (Br. 68).

It is the necessary corollary to a jurisdictional limitation established by the Constitution. In *Johnson* the Court said that the judicial inquiry into the legislative acts in that case "violates the express language of the Constitution," 383 U.S. at 177. Putting in evidence, and thereby putting in issue, the whys and wherefores of legislative action is a direct questioning of legislative acts, in violation of the Speech or Debate Clause.

b) The Solicitor General views the issue as involving removal of "probative evidence . . . from the fact finder's consideration" (Br. 68). Such facts are removed only from the constitutionally inappropriate fact finder; they are completely available to the House under the Punishment Clause. And to the extent that the Article III courts have any jurisdiction of this matter, the Solicitor's argument was made and rejected in *Brewster*:

> "Perhaps the Government would make a more appealing case if it could [prove legislative acts] but here, as in [*Johnson*], evidence of acts protected by the Clause is inadmissible." 408 U.S. at 501.

c) *United States* v. *Nixon, supra,* 418 U.S. 683 (1974), cited for the application of a "balancing process" (Br. 69), is obviously inapplicable. There is no Speech or Debate Clause as to the Chief Executive. 418 U.S. at 704.

d) Neither is the issue whether "the introduction of the disputed evidence will lead to a finding of liability not on some legitimate basis" (Br. 70). The issue is whether the evidence is being admitted in the wrong tribunal, thereby threatening the separation of powers sought to be protected by the Speech or Debate Clause.

e) Admisssion of the evidence sought to be introduced, contrary to the prosecution's argument (Br. 71), would most certainly jeopardize congressional independence. It

would do so precisely because it exposes to a jury's consideration the whys and wherefores of the legislative process. Such a possibility would have an enormously inhibiting effect upon the workings of the legislature.

Finally, reference to the *Brewster* Court's dicta as to the pros and cons of legislative as opposed to judicial adjudication of cases of corruption (Br. 72) are misplaced. The Court there obviously was not referring to cases involving proof of legislative acts; those are necessarily reserved to Congress. The Court was referring to cases and controversies where legislative acts were not implicated, where clearly the courts are acting within their Article III jurisdiction.

II. Congress cannot and in fact did not delegate to the courts its punishment power under Article I, §5 of the Constitution.

For the third time in 13 years, the government presents to the Court its contention that Congress has delegated to the courts, even in respect to the performance of legislative acts, the power to try Members reserved to it under the Constitution and specifically barred to the courts by the Speech or Debate Clause.

In *Johnson* the Court did indeed reserve the issue as to whether a narrowly drawn statute could effect such a transfer of constitutional power.

In *Brewster* the government argued that 18 U.S.C. §201 was such a narrowly drawn statute and that Congress had the constitutional ability to delegate to the courts its power to probe into legislative acts. The Court left open, as it did in *Johnson*, the general question of "the constitutionality of an inquiry that probes into legislative

acts or motivation for legislative acts if Congress specifically authorizes such in a narrowly drawn statute," 408 U.S. at 529, n. 18.

But in doing so, the Court strongly implied that §201 does not constitute such a narrowly drawn statute. First, language employed by the Court clearly indicates that Congress has not yet enacted a "narrowly drawn statute." The Court, being aware that §201(c) is on the books and was argued by the government, uses the following conditional phrase, "if Congress specifically authorizes such in a narrowly drawn statute," *ibid.* This can only mean that Congress has not yet done so.

Second, if the Court felt that §201(c) was such a narrowly drawn statute, it would have had to face the constitutional issue before deciding to limit the government's proof in the *Brewster* trial. If the Court were to hold that §201(c) was narrowly drawn and within the power of Congress, it would have imposed no such limitation. By necessary implication, therefore, Brewster held that §201(c) was not a constitutionally-valid vehicle for delegating Congress's limited judicial power to the Article III courts.

While the government's argument does not improve either with age or repetition, there have been important constitutional expressions since this issue was first presented in *Johnson* and *Brewster* which remove any last semblance of validity from the argument.

Mr. Justice Brennan's dissenting opinion in *Brewster* cogently analyzes this issue, 408 U.S. at 540-49, and no member of the Court indicated disagreement with the conclusion arrived at Beyond that in *United States* v. *Nixon, supra,* a unanimous Court, speaking through the Chief Justice, said:

> "[T]he 'judicial Power of the United States' vested in the federal courts by Art. III, §1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313 (S. Mittell ed., 1938)." 418 U.S. at 705.

If Congress may not share with the judiciary its power to override a presidential veto, how can it share its power to discipline its own Members? And if the judiciary may not share with another branch its judicial power under Article III, how can Congress share *its* judicial power[20] under the Punishment Clause?

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[20] This Court has stated that:

> "Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own members. Art. 1, §5, cl. 1. 'That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections.' *Reed* v. *Delaware County*, 277 U.S. 376, 388 . . . Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the rules of law, and finally to render a

(Footnote continued on following page)

As applied to the power to punish legislators for their legislative acts, it should be noted that the Constitution not only provides for a grant of power to Congress in Article I, §5, but also includes a specific denial of power in Article I, §6, to any branch other than Congress. As this Court said in its first Speech or Debate case, "the powers confided by the Constitution to one of these departments cannot be exercised by another," *Kilbourn* v. *Thompson, supra,* 103 U.S. at 191. Assuming Congress had the power to share with other branches of the government some of the powers granted to it, that hardly means it can also share with others, powers absolutely prohibited to such other branches. To argue then, as does the prosecution, that Congress may enlist the aid of the courts in areas not prohibited to the judiciary *e.g., Burton* v. *United States,* 202 U.S. 344 (1906) (Br. 78), or 2 U.S.C., §192 (Br. 79, n. 33), is plainly irrelevant. What the prosecution is arguing here is that Congress has the power to nullify a specific command of the Constitution prohibiting any other branch from questioning a Member of Congress with respect to legislative acts.

The Speech or Debate Clause is, as this Court explained, a fundamental reenforcing mechanism of the separation of powers, *Johnson,* 383 U.S. at 178. Without that Clause,

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(Footnote continued from preceding page)

> judgment which is beyond the authority of any other tribunal to review.' *Barry* v. *United States ex rel. Cunningham,* 279 U.S. 597, 613 (1929)."

While a footnote in the Court's opinion in *Powell* v. *McCormack, supra,* 395 U.S. at 519, n. 40, limits the impact of the last phrase in the foregoing statement, it certainly does not alter the proper characterization of the congressional powers under Article I, §5, Cl. 1, as being judicial. Plainly the powers under Article I, §5, Cl. 2 fall in the same category.

"all other privileges would be comparatively unimportant or ineffectual," *Storey on the Constitution,* quoted in *Kilbourn* v. *Thompson,* 103 U.S. at 204.

Congress simply has no power to change our form of government; Congress has no power to minimize the independence of the legislature in the scheme of our society; Congress has no power to give to the executive a pressure point on its Members which in a subtle but decisive manner will alter the relationship of forces in the tripartite scheme of government fixed by our Constitution.

We think the matter was settled by *Coffin* v. *Coffin,* 4 Mass. 1 (1808), which this Court referred to as "perhaps the most authoritative case in this country" on the Speech or Debate Clause. *Kilbourn* v. *Thompson,* 103 U.S. at 204. *Coffin* was indeed decided by judges who were contemporary with the formation of the Constitution, and their construction is not merely entitled to great weight, "it is almost conclusive." *Burrow-Giles Lithographic Co.* v. *Saxony,* 111 U.S. 53, 57 (1884).

Said the court in *Coffin, supra*:

> "[A legislator] does not hold this privilege at the pleasure of the House; but derives it from the will of the people, expressed in the Constitution, which is paramount to the will of either or both branches of the legislature . . . of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the House, or by an act of legislature." 4 Mass. at 27.

Clearly, *Coffin* is as much an aspect of the legislative history of §201 as is the utter failure of the debates relating to the 1853 statute to address the Speech or Debate Clause. This, we submit, completely disposes of any contention that Congress intended (if it had the power) to

delegate to the courts a power to discipline Members of Congress with respect to their legislative acts. Moreover, if broad constitutional determinations are to be inferred from a nearly blank legislative history, a comparison of §201 to its predecessor, is probative.

In 1853, Congress first provided for the criminal prosecution of Members of Congress. That legislation was substantially unchanged until October of 1962.[21]

In 1962, when Congress effected a general revision of the conflict of interest laws, it adopted §201, the legislation which governs this case. That statute makes a significant change in the language describing the kind of conduct which is encompassed within its reach. The word "vote" has been deleted. It is not included within the definition of "official act," 18 U.S.C., §201(a).

This deletion could hardly have been accidental. "Vote" is the only statutory word which, as applied to a legislator, may implicate a legislative act. Its excision in 1962 indicated that Congress wanted to eliminate any suggestion that it intended to yield to the courts its power to prosecute legislators for their legislative acts.

The prosecution has incorporated by reference the government's brief before this Court in *Brewster* (Br. 29)

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[21] The statute in the form in which it existed prior to 1962 defined the crime as follows:

> "Whoever, being elected or appointed a Member of or Delegate to Congress, . . . shall, . . . ask, accept, receive, or agree to receive, any money, . . . for his attention to, or services, or with the intent to have his action, *vote,* or decision influenced, on any question, matter, cause, or proceeding, which may at any time be pending in either House of Congress or before any committee thereof, . . ." §110 of the Criminal Code. Act of March 4, 1909, c. 321 Stat. 1088, 1108 (emphasis supplied).

and has used its current brief to reply to some of the points in the brief for appellee in *Brewster* (Br. 86). To avoid further burdening the Court, we believe it appropriate that we incorporate by reference pp. 49-83 of appellee's brief in *Brewster* for further elucidation of the issues herein and we rely exclusively on that brief in respect to a discussion of whether §201 is a "narrowly drawn" statute. We would simply add that *United States* v. *Dowdy,* 479 F. 2d 213 (4th Cir., 1973), a post-*Brewster* decision, specifically held that §201 was not such a statute.

III. The Speech or Debate Clause creates rights and relationships which are not waivable and, if they were, any waiver must be express.

The short answer to the waiver argument is that the Speech or Debate Clause establishes a jurisdictional limitation upon Article III courts and no waiver can effect a shift in jurisdiction. See our opening brief, pp. 64-65.

Since the Solicitor General refuses to acknowledge the jurisdictional impact of the Speech or Debate Clause, he simply does not respond to this issue, which in our view is dispositive.

We shall nevertheless respond to the Solicitor's argument on its own terms.

Throughout its brief, the prosecution argues in derogation of the vitality of the Speech or Debate Clause. It argues that it can prove legislative acts if it is not trying them; if not that, it argues that it can introduce legislative acts depending on the form of proof; if not that, it argues that the Speech or Debate Clause protection of Members of Congress has been abandoned in any §201 prosecution; and if not that, it finally argues that in this case, the Speech or

Debate Clause does not apply because its protections have been waived by Mr. Helstoski in testifying before the grand jury. The waiver argument is presented here as a sort of last gasp[22] in a brief wherein the government never acknowledges the real power of the Clause to protect Members of Congress against the sort of prosecution envisaged here.

The prosecution's argument as to waiver has two points:

a) that the Clause functions for the benefit of the individual Member of Congress and only for his personal benefit and he may waive its protections, and

b) that such a waiver may be accomplished by something less than a clear and express disavowal of its protection. We respond to these arguments as follows:

A. The Speech or Debate Clause creates an institutional as well as a personal protection.

Whether or not one considers the protection of the Clause personally waivable by a Member of Congress, it is beyond argument that the Clause was not designed to

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[22] We note that the government had another string to its bow in the lower court where it argued that even aside from a grand jury proceeding, *any* public, non-Congressional dissemination of information regarding legislative acts constituted a waiver. See our opening brief, p. 69. The District Court pointed out that such a view of the Speech or Debate Clause was inconsistent with "the political realities of our democratic system" (Pet. No. 78-349, 56a).

The government now dismisses this as "some imprecision in the government's argument below" (Br. 118) from which it quickly retreats. There was nothing imprecise about the government's argument below; indeed, it was straightforward. This exercise by the prosecution merely demonstrates its determination to undercut the Speech or Debate Clause one way or the other.

protect the individual Member alone but rather to protect him *and* Congress, thereby implementing the separation of powers. It is therefore inappropriate to consider whether the Clause is waivable without assessing the impact of waivability on Congress. Likewise, if waiver is possible, the circumstances under which it may occur must rest upon considerations of its effect upon congressional independence.

But, in his arguments on waiver, the Solicitor General chooses to regard the Clause as no more than an evidentiary privilege, overlooking its fundamental structural importance in maintaining the separation of powers. Thus, the prosecution says that "unless there is something unusual about the Speech or Debate Clause that requires adherence to an especially high standard" (Br. 111), Mr. Helstoski should be held to have waived the protection of the Clause by virtue of testifying and producing documents before a grand jury.

Of course there is "something unusual" about the Speech or Debate Clause: It is the mechanism by which the independence of Congress, in our separation of powers system, is preserved from the encroachment of other branches. As such, its primary function is clearly institutional.

The Solicitor's argument that waiver of the Speech or Debate Clause is possible rests upon the view that the Clause creates *only* a personal privilege and that Congress has no interest in the matter. The Solicitor claims this is the "prevailing view" of the Clause and cites (Br. 115), as comprising this view, an overruled case (*United States* v. *Craig,* 528 F.2d 773 (7 Cir. 1976)); an ambiguous footnote (*Gravel* v. *United States,* 408 U.S. 606, at 622 n. 13); and a misconstrued precedent (*Coffin* v. *Coffin,* 4 Mass. 1 (1808), all of which were dealt with in our opening brief, at pp. 63-67. It now adds to its composition of the "prevailing view" of the personal nature of the Speech or Debate Clause two citations indicating merely that the privilege created by the Clause may be invoked by an individual Member when necessary and is not defeasible by Congress (Justice Brennan's dissent in *Brewster,* 408 U.S. at 547, and *In re Grand Jury Proceedings (Cianfrani),* 563 F.2d 577 (3 Cir. 1977)), and one citation, *Powell* v. *McCormack,* 395 U.S. 486, 505, whose import remains mysterious to us.

These citations, introduced initially to show that the Clause creates only a personal privilege, are then transmogrified immediately to "a widespread assumption that a Congressman can waive his Speech or Debate privilege" (Br. 116). Weak enough when serving to support a "prevailing view" that the privilege is personal, the six citations are now taxed with carrying the weight of a "widespread assumption" that the privilege is waivable; they are unequal to that burden. Clearly, to say that a privilege is personal in the sense of *Coffin, supra,* merely means that it may even be asserted over the objection of the House. There is a great difference between that position and the argument that the privilege may be waived without approval of the House.

In fact, in arguing that the Clause may be waived, the Solicitor General does not cite the most immediately relevant precedent, *Johnson.* In that case, the Congressman's speech on the floor of the House was introduced by the government in its case-in-chief *without objection by Representative Johnson* (Gov. Br. in *Johnson,* p. 5, n. 2). Moreover, Johnson later introduced the speech in his own defense. There, too, the government argued something akin to waiver, for this Court summarized the government's argument as including the following: "The govern-

ment contends that the Speech or Debate Clause was not violated because . . . the defendant . . . introduced the speech," 383 U.S. at 184. The Court quickly dismissed this argument, emphasizing what we have said here, namely, that such a waiver contention cannot prevail in a case involving the Speech or Debate Clause. Nowhere in the opinion of this Court is there any indication that Johnson thereby waived his right to assert later that his prosecution had, on that account, violated the Speech or Debate Clause. The case at bar is even stronger than *Johnson* because here, any arguable waiver occurred in a forum other than the trial court.

The government, in response to our waiver point, seems unable to accept the plain fact that the Speech or Debate Clause serves to protect Congress *and* its Members and, for that reason, may be asserted by Members of Congress when they perceive they are, by virtue of their offices, in jeopardy and that it need not be asserted when they are not is such jeopardy. Thus, the government asks, is it possible that a Member can use his legislative acts in his own defense but object and raise the privilege when the government seeks to use his acts against him? Can this be what the Framers intended? To this we must reply, in both cases, in the affirmative. A Member may defend himself with his own acts and repudiate the use of his acts against him, precisely because the former does not constitute "questioning" of those acts, while the latter does.

Indeed, the prosecution, in its own fashion, recognizes this when it says that:

> "[I]f a Member of Congress himself decides to place evidence of his legislative acts before the jury, it is difficult to see how admission of that evidence could jeopardize the congressional independence guaranteed by the Speech or Debate Clause." (Br. 113-114)

We agree, assuming that the Member's acts are not being "questioned." Where, however, as here, the Member learns only later that it is *his* acts that are the target of grand jury scrutiny, it can hardly be said that by producing evidence of his acts he has waived his objections to the "questioning" of those acts or that, in view of the institutional interests of the Speech or Debate Clause, he had the power to submit to being "questioned" about his acts by the grand jury. See Jefferson's *Manual,* referred to at pp. 65-66 of our main brief.

B. Waiver, if possible, must be express.

The prosecution appears to believe that there is no justification for the standard which the courts below held a waiver of the Speech or Debate protection would require, were such waiver possible. That standard is no more than a finding that one entitled to the protection of the Speech or Debate Clause, cannot be held to have waived his rights absent express waiver. Assuming that waiver is possible, the deference due Congress by the courts would seem to mandate no less. It is in keeping with the prosecution's naive questioning whether there is "something unusual" about the Speech or Debate Clause that it finds such a standard "extraordinary" (Br. 117).

There was no such express waiver by the Member in this case. The mere fact that he chose not to invoke the Fifth Amendment when he was given the standard warnings regarding the privilege against self-incrimination can by no means be interpreted as a waiver of the Speech or Debate Clause.

The prosecution's objection to the express waiver standard rests on the hypothetical case of "a Senator or Representative [who] know[s] the purpose of a particular investigation and deliberately fails to claim the privilege" (Br. 119). Apparently, the prosecution here means that a Member who knows the purpose of the investigation is to target him, but nevertheless fails to claim the privilege, would not be deemed to have waived it.

This argument falls of its own weight. How could the Member know he is a target? It can only be if the Member is told so by the United States Attorney. Surely it poses no great problem for the United States Attorney to follow up that statement with a query as to whether the target waives the protection of the Speech or Debate Clause. Similar scenarios, focusing on the Fifth Amendment privilege against self-incrimination, take place every day.

C. Policy considerations against waiver.

It is the absolute and impenetrable nature of the Speech or Debate Clause which protects Congress. If that barrier be breached by one, it will be breached by many and will serve no function. Thus, in addition to the explicit support for non-waivability found in the history of the Clause, which we point out in our opening brief at pp. 65-66, contemporary reasons exist to explain the continued necessity for that policy.

The practical consequences of accepting the government's waiver argument would be to diminish congressional independence. Let it once be known that a Member of Congress can waive the protection of the Speech or Debate Clause and any failure to waive in the course of a grand jury investigation or at trial will immediately be taken

as proof of the Member's guilt. In much the same way that a failure to waive the self-incrimination protection of the Fifth Amendment is regrettably seen by the public as an admission of guilt, so will a failure to waive the Speech or Debate Clause be taken as an admission of corruption. And the Solicitor General has already laid the foundation for this by suggesting that the privilege against self-incrimination and the Speech or Debate Clause are analogous (Br. 15).

Thus, legislators will be caught in the web of executive action—exactly what the Speech or Debate Clause was designed to prevent.

Statements by the Solicitor General that Members of Congress will not be fearful of one or another intrusion into their Speech or Debate privilege and will not be inhibited in their work (Br. 71) are hardly convincing. Persons with considerably more experience with the legislative process have expressed quite clearly the impact upon legislators of a breach of the Speech or Debate Clause.[23]

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23 "I have spent about six years serving in the legislature of North Carolina. And altogether I have served almost 19 years in the Congress in one House or the other, and I have to testify to this Court that among the most timid creatures I have ever seen are legislators. They can cope, in a sense, with isolated criticisms of their constituents who have a right under the Constitution, incidentally, to criticize them, and they can cope with criticism from the press, which has a right to criticize their conduct. But I don't know anything that would come nearer scaring a poor Senator or poor Representative to death than to have either the executive branch of the government with all of the might, governmental might, which the executive branch possesses, or the ju-

(Footnote continued on following page)

CONCLUSION

For the foregoing reasons, in No. 78-546 the judgment of the court below should be vacated and the cause remanded with instructions to dismiss Counts I through IV of the indictment. Failing that, in No. 78-349 the judgment of the Court of Appeals should be affirmed.

Dated: Newark, New Jersey
March 22, 1979.

Respectfully submitted,

MORTON STAVIS
Attorney for Henry Helstoski

On the Brief:

LOUISE HALPER

(Footnote continued from preceding page)

dicial branch of the government with all the respect which the judicial branch enjoys as an impartial body . . . to have the power to pass officially in any way on their conduct as a legislator. That would absolutely destroy the independence of the legislative body . . ." Senator Ervin's oral argument before this Court in *Gravel*, pp. 7-8.

Nos. 78-349 and 78-546

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY HELSTOSKI, RESPONDENT

HENRY HELSTOSKI, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

HONORABLE H. CURTIS MEANOR, NOMINAL RESPONDENT

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE HONORABLE THOMAS P. O'NEILL, JR., SPEAKER; THE HONORABLE FRANK THOMPSON, JR., CHAIRMAN AND THE HONORABLE WILLIAM L. DICKINSON, COMMITTEE ON HOUSE ADMINISTRATION, OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AS AMICI CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-349

UNITED STATES OF AMERICA, PETITIONER

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UNITED STATES OF AMERICA, RESPONDENT

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF THE HONORABLE THOMAS P. O'NEILL, JR., SPEAKER; THE HONORABLE FRANK THOMPSON, JR., CHAIRMAN AND THE HONORABLE WILLIAM L. DICKINSON, COMMITTEE ON HOUSE ADMINISTRATION, OF THE UNITED STATES HOUSE OF REPRESENTATIVES, FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The Speaker of the United States House of Representatives, and the Chairman of the Committee on House Administration hereby respectfully move for

leave to file the accompanying brief *amici curiae*. The consent of the Attorneys for Congressman Helstoski has been obtained. The consent of the Solicitor General was requested, but was declined. The Office of the Solicitor General has represented, however, that it does not object to the filing of the motion.

On October 15, 1978 the Ninety-Fifth Congress adjourned *sine die*. 124 Cong. Rec. H12995 (daily ed. Oct. 14, 1978) H.R. Con. Res. 760, 95th Cong., 2d Sess. Thereafter the petitions for certiorari in Nos. 78–349 and 785–46 were granted on December 11, 1978. On January 15, 1979, the Congress reconvened and proceeded to attend to certain organizational matters, including the swearing in of Members-elect, adoption of rules and election of the Speaker. 125 Cong. Rec. H1–4 (daily ed. Jan. 15, 1979).

Accordingly, the House adjourned before the Court accepted this important case for consideration and reconvened only very recently. This sequence of events did not permit the Speaker or the Chairman adequate time to prepare and file a brief before this time. However, a draft of this motion and brief were supplied to the Solicitor General by hand delivery on February 6, 1979 to afford the earliest opportunity for them to meet any points raised herein in their brief which is due on February 24, 1979.

As we believe the Court recognizes, this case presents for resolution questions of the most critical and fundamental nature to the legislative branch. The Speech or Debate Clause of the Constitution, and the concept of legislative immunity which it embodies, is

unique. There is no similar express grant duplicated in either Article II, concerning the Executive Branch, or Article III, concerning the Judiciary. The present case represents, in our view, a serious challenge to the continued viability of the Speech or Debate clause, as well as the interpretations of this Court which have addressed the scope and effect of the Clause. At issue is whether the legislative acts of a Member of Congress may be introduced into evidence against him at his trial for allegedly accepting bribes in return for being influenced in his official actions. *Amici* do not contend that Members of Congress should be exempt from bribery laws. Any Members' acceptance of a bribe is demeaning to every person holding elective legislative office, and Members should be held accountable for the acceptance of bribes. The proof of that act in any disciplinary forum other than the Congress, however, must be accomplished without compromising the jurisdiction of the Congress or inquiring into the legislative act or its motivation. Moreover, prosecutors should not be enabled by a decision of the Court to seek and obtain indictments, as was done in this case, upon the basis of legislative acts.

Because the case concerns the constitutional privileges of a coequal branch of government—the Legislature—we believe the Court should have before it the views of representatives of that Branch in deciding the case.

In this connection, *amici* believe that they are in a unique position to bring to the Court's attention views and arguments which will not be briefed by the par-

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ties. Specifically, *amici* intend to present their views with respect to the exercise of the Article I, § 5 disciplinary power bearing directly on this case, which is unlikely to be brought to the attention of the Court in the manner and detail discussed by *amici*. Secondly, the argument provided by *amici* on the critical issue concerning the validity of an indictment based on speech or debate material has not heretofore, to our knowledge, been presented to the Court and will not be provided by the parties.

As the constitutional officer of the body of the House responsible for upholding the privileges of all Members of the body and the Chairman of the Committee with responsibility for the proper and efficient management of House legislative and administrative functions, the Speaker and Chairman of the Committee on House Administration, respectfully, contend that as *amici* they are uniquely capable of presenting to the Court views and information which will assist the Court in deciding this case consistent with the demands of justice and the prerogatives of a co-equal branch.

Accordingly, *amici* urge that leave be granted to file the accompanying brief *amici curiae* and respectfully so moves this Court.

Respectfully submitted,

The Honorable Thomas P. O'Neill, Jr.,
Speaker, U.S. House of Representatives,
The Honorable Frank Thompson, Jr.,
Chairman, Committee on House Administration,
U.S. House of Representatives.
and
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-349

UNITED STATES OF AMERICA, *Petitioner*

v.

HENRY HELSTOSKI, *Respondent*

No. 78-546

HENRY HELSTOSKI, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

HONORABLE H. CURTIS MEANOR, *Nominal Respondent*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICI CURIAE OF THE HONORABLE THOMAS P. O'NEILL, JR., SPEAKER; THE HONORABLE FRANK THOMPSON, JR., CHAIRMAN AND THE HONORABLE WILLIAM L. DICKINSON, COMMITTEE ON HOUSE ADMINISTRATION, OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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The Speaker of the United States House of Representatives, pursuant to the authority vested in him by the Constitution and rules of the House, and the Chairman of the Committee on House Administration hereby appear as *amici curiae*. Consent to file has been obtained from Congressman Helstoski's attorneys. Consent was requested from the Solicitor General but was declined. The Solicitor, however, has stated he will not oppose the filing of the motion. Copies of these letters have been filed with the Clerk's Office.

INTEREST OF THE AMICI CURIAE

The present case involves issues of paramount importance to the Legislative Branch of government and the due functioning of the legislative process. The Speech or Debate Clause of the Constitution, as the great bulwark of the doctrine of separation of powers and the Framers' guarantee of a vigorous and independent Congress, virtually uninterpreted for the first century of the republic's existence, has been subject with increasing frequency to judicial review. Because of the importance of the Clause to the legislative branch as a separate and distinct institution of government, *amici* believe the Court should have before it views and information, in addition to that supplied by the parties, furnished by representatives of the branch to assist in its consideration and resolution of the issues presented. Truly, the Members of the House and Senate will live with the decision in this case.

As the Constitutional officer of the House of Representatives, U.S. Const., art. I, § 2, cl. 5, the Speaker has a direct responsibility to protect the constitutional rights and privileges of the body which elects him. The challenge to the scope and efficacy of the Speech or Debate Clause protection presented by this case, as well as the other constitutional powers of the House, clearly implicates the interests of the Speaker in upholding the rights and privileges of the House.

In addition, the House by specific resolution has, for example, delegated to the Speaker the responsibility to insure that subpoenas for documentary evidence in possession and control of the House are consistent with the rights and privileges of the House, H.R. Res. 10, 96th Cong., 1st Sess., 125 Cong. Rec. H17 (daily ed. Jan. 15, 1979). *See also, for example,* 2 U.S.C. § 194 requiring the Speaker to certify and report to the United States Attorney for prosecution any failure by a witness called to testify before Congress, and *Wilson* v. *United States,* 369 F. 2d 198 (D.C. Cir. 1966) [statute provides discretion to Speaker to determine whether to certify and report to the United States Attorney failure of witnesses to testify].

From the inception and emergence of parliamentary democracy in England, the Speaker of the House has by custom and tradition, as well as rule of law, been responsible for the protection of the legislature's privileges. T. Plucknett, Taswell-Langmead's English Constitutional History From the Teutonic Conquest to the Present Time, 209, 264–47 (11th ed. 1960). As recently stated: "he [the Speaker] is charged with

protecting the rights of *all* the Members of the House, majority and minority Members alike." The Office and the Duties of the Speaker of the House of Representatives, H.R. Doc. No. 95–354, 95th Cong., 2d Sess. 5 (1978) [ordered printed by the House pursuant to H.R. Res. 1136, 95th Cong., 2d Sess. (1978).]

Likewise, the Chairman of the Committee on House Administration, which has broad responsibility under the rules of the House and statute to implement and oversee the orderly and efficient administration of the House, has a direct interest in insuring the integrity and viability of the internal affairs and procedures by which the House conducts its legislative business, including the introduction of bills and the supervision and oversight of their enrollment and the operation of Committee offices and other internal units within the House of Representatives.

SUMMARY OF ARGUMENT

The Speech or Debate Clause of the Constitution, as has often been stated, is not a personal protection to shield the misdeeds of a Member of Congress from prosecution. Rather it is an integral component of the doctrine of separation of powers upon which our government is founded and is intended to insure an independent and rigorous Legislative Branch functioning free of the threat of retaliation from the prosecutorial department for the performance of acts carried out in furtherance of the Article I legislative power.

When a grand jury charges and the prosecution seeks to prove legislative acts and references to those

acts in connection with a prosecution under the federal bribery statute the permissable bounds of the Speech or Debate Clause, as enunciated in the decisions of this Court regarding both the Clause and its underlying purpose, has been exceeded.

In order to give effect to the prior decisions concerning the Clause, two points will be urged: (1) the ruling fashioned by the Third Circuit in this case prohibiting the introduction into evidence of private immigration bills and references to those bills is consistent with the holdings in the *Johnson* and *Brewster* cases; and (2) an indictment clearly returned by a grant jury on the basis of speech or debate material submitted to it by the prosecution is defective and cannot stand. Although the policies underlying the proscription, grounded upon the Fifth Amendment, against hearsay evidence and the Fourth Amendment prohibition against unreasonable searches and seizures do not require the dismissal of indictments resulting from breaches of those protections, the policies upon which the Speech or Debate Clause are premised render a breach of the privilege before a grand jury fatal to the indictment in that it constitutes both a prohibited questioning of an individual Member and a violation of the separation of powers doctrine, which the Clause is designed to effect.

In complement to the Speech or Debate Clause, the Framers of the Constitution vested power in the Congress to discipline its own Members for legislative misconduct. The House has, in recent years, responsibly and vigorously exercised this power in a number

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of areas where legislative misconduct has been discovered. The House has done so with full recognition of the constitutional limits of its powers and consistent with fundamental notions of fairness and justice by providing a comprehensive array of procedural and substantive safeguards to Members charged with misconduct. Moreover, the House has proceeded in a non-partisan and judicious manner, and the record established by the House in pursuit of these matters has been exemplary, with respect to the thoroughness of the investigation of misconduct and the rendering of judgment by the House. Accordingly, the Speech or Debate Clause, together with the disciplinary power, vests jurisdiction in the House to charge, try, and punish Members for legislative misconduct, which the House has exercised in an appropriate and just manner. This jurisdictional allocation does not prevent criminal prosecutions of Members of Congress for violations of criminal law such as the federal bribery statute, but simply requires that such criminal prosecutions be conducted in a manner consistent with the Clause and the decisions in the *Johnson* and *Brewster* cases.

In regard to the question of whether the Speech or Debate privilege can be waived, it is submitted that the Clause imposes more of a constitutional prohibition on the powers of the Executive and the Judiciary than a personal privilege for individual Congressmen. The clear historic purpose of the Clause is to protect and foster the separateness and independence of the Legislative Branch from intimidation or coercion by a

possibly hostile Executive or Judiciary. Moreover, the Clause, where applicable, imposes an *absolute bar* to the interference it proscribes. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503 (1975). Accordingly, the prohibition is jurisdictional in nature and can not be "waived" either by an individual Member of Congress, or by Congress, or by both acting in conjunction.

Should this Court, nevertheless, seek to fashion a doctrine of waiver applicable to the Speech or Debate Clause, the policy behind the Clause dictates that any such doctrine be a strictly limited and precisely defined one: any waiver must be express and not implied; any waiver must require the concurrent acquiescence of the Member being questioned and of Congress (or of the Member's House); and any waiver must be limited to the precise proceedings at which it is made and not spill over to apply to other, subsequent proceedings.

ARGUMENT

I. THE CONSTITUTION VESTS EXCLUSIVE JURISDICTION IN THE HOUSE FOR THE PUNISHMENT OF MEMBERS ON ACCOUNT OF PERFORMANCE OF LEGISLATIVE ACTS AND THE HOUSE HAS APPROPRIATELY EXERCISED THAT JURISDICTION

The Speech or Debate Clause, as written by the Framers and interpreted by this Court, prohibits the "questioning" of a Member outside of the House for legislative conduct performed *in* the House. U.S. Const., art. I, § 6, cl. 1. In addition, each House of

Congress is authorized to "punish its Members for disorderly Behavior, and, with the concurrence of two thirds, expel a Member." U.S. Const., art I, § 5, cl. 2.

These two provisions, taken together, provide the basis upon which the House may inquire into legislative conduct by Members and render punishment for acts which are deemed by the body contrary to appropriate congressional standards or mores.[1]

Operating in complement to each other, the Speech or Debate Clause and the Punishment Clause deprive the Executive and Judicial Branches of jurisdiction to question, charge, try or punish a Member for legislative misconduct within the House.

The policies and purposes underlying this jurisdictional concept have been thoroughly explored and articulated by this Court in previous cases. See *United States* v. *Johnson,* 383 U.S. 169, 177–182 (1966); *Gravel* v. *United States,* 408 U.S. 606 (1972); *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975). As these cases indicate, the Speech or Debate Clause enforces the separation of powers doctrine so integral to the proper functioning of our tripartite form of government and prevents

[1] Article I, § 5, cl. 1 of the Constitution provides separate authority for the House to be "the Judge of the Elections, Returns and Qualifications of its own Members." The power of the House to *exclude* a Member under this grant has been described as "more an incident of Congress' power as supreme board of elections than of its power as guardian of congressional ethics." McLaughlin, *Congressional Self Discipline: The Power To Expel, To Exclude and To Punish,* 41 Ford.L.Rev. 43, 58 (1972). Accordingly, this provision will not be considered further here.

intimidation of legislators by the executive or accountability before the judiciary for legislative acts and is firmly rooted in English parliamentary history.[2]

From the earliest days of the republic, each House of Congress has exercised the exclusive jurisdiction conferred upon it by the Constitution to discipline Members for legislative misconduct, unruly behavior or acts reflecting discredit upon the integrity of the body. *See,* HOUSE OF REPRESENTATIVES EXCLUSION, CENSURE AND EXPULSION CASES FROM 1789 TO 1973, SUPPLEMENTAL APPENDIX TO HEARINGS ON CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS, JOINT COMM. ON CONG. OPERATIONS, 93d Cong., 1st. Sess. (Comm. Print 1973).

In the course of its holding in *United States* v. *Brewster,* 408 U.S. 501, 518 (1972) commenting upon Senator Brewster's contention for a broad interpretation of the Clause which would exempt from judicial inquiry matters related in any way to the legislative process, this Court raised doubts about the ability of

[2] Early American experience ratified the necessity for and wisdom of the Clause's inclusion in the Constitution. During the infamous "alien-sedition" period, the Federalist administration used the judiciary to intimidate and harrass anti-Federalist Congressmen. For a detailed discussion of the background and substance of these cases *see* Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers,* 86 Harv. L. Rev. 1113, 1140–1144 (1973) [*Cabell's Case* and *Matthew Lyon's Case*]. Nor has the passage of time proven that we have experienced the last of such abuses. A recent indictment of former Congressman Garmatz was voluntarily dismissed at the request of the U.S. Attorney's office after it was discovered that the prosecution's main witness had contrived a story to implicate the Congressman to shield himself from prosecution. Washington Post, Jan. 10, 1978, at 1, col. 1.

the Congress to properly and actively exercise its Article I, § 5 disciplinary power. The Court stated that "Congress has shown little inclination to exert itself in this area," *United States* v. *Brewster,* 408 U.S. at 519, and that even if Congress were so inclined, "The process of disciplining a Member in the Congress is not without countervailing risks of abuse since it is not surrounded with the panoply of protective shields that are present in a criminal case." *Id.*

Whether those statements were accurate at the time they were voiced, they certainly no longer accurately depict efforts by the House to fully exercise the powers available to it under the Constitution's grant of jurisdiction to "investigate, try and punish" its Members for behavior related to the legislative process.

In this connection, the House recently completed its investigation, trial and punishment of certain Members of the House for conduct elicited during the so-called Korean Influence Investigation. In response to allegations about attempts by purported agents and representatives of the government of the Republic of Korea to influence through gifts and emoluments to Members of the House, United States policy toward and relations with the Republic of Korea, the House passed a special resolution authorizing and directing the Standing Committee on Standards of Official Conduct ("Committee") to "conduct a full and complete inquiry to determine whether Members of the House . . . accepted anything of value from the Government of Korea," H.R. Res. 252, 95th Cong., 1st Sess. (1977); 124 Cong. Rec. H984–993 (daily ed. Feb. 9, 1977), and to recommend to the House "such action, if

any, that the Committee deems appropriate with respect to individual Members, officers and employees of the House as a result of any alleged violation of the Code of Official Conduct or any law, rule, regulation or other standard of conduct applicable to the conduct of such Member, officer or employee in the performance of his duties or the discharge of his responsibilities." *Id.*

That the House was acting in pursuance of its Article I, § 5 disciplinary power is clear from the following introductory statement adopted by the Committee soon after its mandate from the full body to pursue this matter:

> "The committee resolution contemplates two distinct types of proceedings, which may take place concurrently or in successive stages. (Compare sec. 1 and 2 with sec. 3) [of H.R. Res. 252, *supra*] One type is a general investigation to ascertain the basic pattern of questionable contacts between Korean representatives and Members of the House, so that the committee can assess the adequacy of existing laws and standards. The other type involves the lodging and investigating of charges against specific Members of the House, *in order to determine whether to recommend that the House exercise its power under Article 1, Section 5, clause 2, of the Constitution to 'punish its Members for disorderly Behaviour, and, with the concurrence of two-thirds, expel a Member.'*"

MANUAL OF OFFENSES AND PROCEDURES KOREAN INFLUENCE INVESTIGATION PURSUANT TO HOUSE RESOLUTION

252, COMM. ON STANDARDS OF OFFICIAL CONDUCT 95th Cong., 1st Sess. 1 (Comm. Print 1977) (hereinafter referred to as "Manual of Offenses and Procedure") (emphasis added).

In order to guarantee a complete and thorough investigation, the House engaged eminent special counsel, Mr. Leon Jaworski, to conduct the proceedings of the Committee. During the course of the investigation the Committee held 72 meetings, including 16 public hearings, and its staff conducted 718 interviews, took 165 sworn depositions, obtained more than 40,000 documents, and authorized immunity grants for 19 individuals. [Summary of Activities, a Report of the Comm. on Standards of Official Conduct,] H.R. Rep. 95–1818, 95th Cong., 2d Sess. (1978).[3]

The ability of the Committee to carry out its mandate from the House was enhanced by the recruitment of a special staff of attorneys, investigators and support staff with substantial prior experience in law enforcement, and financial investigations much of

[3] The methodology and scope of the inquiry was broad and its implementation was vigorous. As a preliminary step, the Committee directed a questionnaire to each person who served as a Member of the House since January 3, 1970, which inquired about contacts with representatives of the Korean government, and the offer of receipt of gifts of over $100 in value. KOREAN INFLUENCE INVESTIGATION, REPORT BY THE COMM. ON STANDARDS OF OFFICIAL CONDUCT, H.R. Rep. No. 95–1817, 95th Cong., 2d Sess. 2 (1978) ("Final Report"). Followup interrogatories were directed to Members after review. *Id.* at 3. The Committee also sought and received information from other agencies of the Federal Government. *Id.*

which was gathered in executive branch law enforcement agencies and departments. Final Report at 2.

As a result of the investigation, statements of alleged violation were filed against four incumbent Members of the House. Final Report, *supra* at 57. In addition, seven other Members of the House who were investigated were specifically absolved of any wrongdoing or impropriety. *Id.* at 58. Finally, it was determined that five additional former Members who had been investigated were beyond the jurisdiction of the House, and in any event had not been active participants in the alleged Korean influence scheme. *Id.* at 59.

The full House, to which disciplinary recommendations were reported by the Committee on three Members, acted by voting disciplinary sanctions in each case. 124 Cong. Rec. H12820–12828, H13249–13261 (daily ed. Oct. 13, 1978).[4]

This very recent massive and comprehensive exercise of the Article I, § 5 disciplinary power by the House should sufficiently counter any remaining impression that the House "has shown little inclination to exert itself" in the disciplinary sphere. Moreover,

[4] Since the "Committee pursued its investigative task much as does a grand jury . . . evidence was gathered and evaluated in executive session. . . . Thus, the publication of suspicious but unreliable information was avoided." Final Report at 4. In one case, the Committee, after deliberating under the prescribed procedure on the statement of alleged violation, and after briefing and oral argument, dismissed the charges because they were not sustained by the evidence. In the Matter of Representative Edward J. Patten, H.R. Rep. No. 95–1740, 95th Cong., 2d Sess. 1–4 (1978).

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the recent disciplinary exercises by the House have not been limited by any means only to legislative misconduct which assumes the grandiose and complex proportions of those of the Korean influence scheme. In the recent Congresses, Members have been investigated and disciplined for a variety of legislative activities, including failing to report certain financial holdings as required by House rules, and for investing in stock in a Navy bank, the establishment of which the Member was promoting, In The Matter of a Complaint Against Representative Robert L. F. Sikes, H.R. Rep. No. 94–1364, 94th Cong., 2d Sess. (1976), H.R. Res. 1421, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. H7924–7927 (daily ed. July 29, 1976); for the release and disclosure of classified information in possession of the House by a Member thereof in violation of House rules, 31 Congressional Quarterly Almanac 401 (1975);[5] and for violating the Code of Official Conduct of the House of Representatives in allegedly receiving compensation from a law firm, a part of which was for services rendered by the firm in connection with a

[5] In this case, it was determined, upon reference and consideration of a complaint to the Committee on Standards, not to recommend any action against the Member involved, since the hearing at which the information had originally been disclosed to the House was not a legally constituted executive session. However, although the Member was not disciplined by the committee with jurisdiction of ethical conduct, the Committee on Armed Services, before whom the information was adduced, formally denied further access by the Member to classified information during the pendency of consideration of the matter by the Committee on Standards. 121 Cong. Rec. D725 (daily ed. June 16, 1975).

matter before a government agency. In the Matter of Representative Joshua Eilberg, Statement of Alleged Violations, Sept. 13, 1978, H.R. Rep. No. 95–1818, *supra* at 3.

Of equal significance is the degree to which the "countervailing risks of abuse" referred to in *Brewster* have been minimized by adoption of and compliance with detailed rules of procedure and process to guarantee that the disciplinary power is exercised responsibly and fairly.

The Constitution, in Article I,§ 5,cl.2, confers express authority on the House to "determine the Rules of its Proceedings." Acting under this grant, the House has conferred jurisdiction concerning the discipline of Members to the Committee on Standards of Official Conduct, H.R. Rule X,cl.4(e)(1), Rules of the House of Representatives § 698 at 408, *reprinted in,* H.R.Doc. No. 94–663, 94th Cong., 2d Sess. (1977) ("Rules of the House"). In addition, H.R. Rule XI,cl.2(a), Rules of the House, § 704 at 423, provides that "[e]ach standing committee of the House shall adopt written rules governing its procedure." Accordingly, the Committee on Standards has developed detailed rules of procedures governing complaints lodged against Members. Rules of the Committee on Standards of Official Conduct, *reprinted in* RULES ADOPTED BY THE COMMITTEES OF THE HOUSE OF REPRESENTATIVES, SELECT COMM. ON CONG. OPERATIONS, 95th Cong., 1st Sess. 203–210 (Comm. Print 1977) (hereinafter "Committee Rules"). These rules require that complaints filed by an individual be in

writing and under oath and be concisely pleaded together with specific factual averments, Committee Rule 5(a) at 204. In addition, a respondent to a complaint has 21 days within which to respond, either by answer or motion, Committee Rule 7(a)(1) at 205, and with respect to motions may affirmatively plead, *inter alia,* lack of jurisdiction of the Committee to investigate, an objection to the complaint on the grounds of improper form or failure to state facts constituting a violation of applicable law, rule or standard of conduct. Committee Rule 7(a)(1)(B) & (C) at 205. The staff is authorized to respond to any motion or answer, and such responses are furnished to the respondent. If it is determined to proceed beyond a preliminary inquiry to the investigative stage, other safeguards attend the investigative hearing stage of the proceeding. The respondent is (1) given an opportunity to apply for issuance of subpoenas for witnesses or for the production of documents, Committee Rule 12(d) at 208; and (2) permitted through himself or counsel to cross-examine Committee witnesses, Committee Rule 10(c)(1)(C) at 207. In addition, under applicable rules, the Committee may determine, where appropriate in its discretion, to proceed in executive session, H.R. Rule XI,cl.2(K)(5), Rules of the House, *supra,* § 712 at 435. Other procedural and substantive safeguards apply by virtue of the Committee Rules including rules prohibiting unauthorized disclosure of information in possession of the Committee, Committee Rule 15(a).

These protective provisions amply support a finding that the House, in view of the potentially serious ramifications for a Member subject to a disciplinary proceeding, accords a Member charged with misconduct within the House, the full "panoply of protective shields present in a criminal case," *United States* v. *Brewster,* 408 U.S. 501, 519 (1972).[6]

Contrary to the contention in *Brewster,* that a Member is "at the mercy of an almost unbridled discretion of the charging body . . . from whose decision there is no established right of review," this Court has itself fashioned protections and established the availability of review in disciplinary cases where the legislative body has exceeded its authority, violated procedural mechanisms provided in the Constitution governing disciplinary proceedings or issued judgments which contravene specific constitutional guarantees in *Powell* v. *McCormack,* 395 U.S. 486, 512, 548 (1969), this Court found jurisdiction and a justiciable case or controversy under Article III when the late

[6] In the Korean influence investigation, because of the unprecedented scope of the inquiry and to insure adherence to readily cognizable standards in determining whether a Member, officer or employee acted properly, the Committee identified the specific provisions of the Constitution, Federal statutes, regulations, House rules and other standards on which it relied in assessing whether conduct was improper or unethical, Manual of Offenses and Procedures, *supra,* at 4–38, as well as the standard of proof required to support a finding of such conduct. *Id.* at 38–40. This represented an additional safeguard against arbitrary or capricious judgments since it required the Committee to specify the standards on which it would assess conduct and also placed potential respondents on notice as to the likely nature of charges to which they might be required to answer.

Adam Clayton Powell successfully invoked judicial review of his exclusion from the 90th Congress to which he had been duly elected. In *Bond* v. *Floyd,* 385 U.S. 116 (1966), this Court found that a state legislator's statements denouncing the Vietnam War provided no legal basis for his disqualification from office, that his expression of sympathy for those unwilling to respond to the draft was not a call to an unlawful refusal to repond and that the disqualification of the legislator because of his statements violated his right of free expression under the First Amendment. *Bond* v. *Floyd,* 385 U.S. at 137.

The Court has shown no reticence to review legislative disciplinary proceedings and, where necessary, remedy constitutional wrongs. Although *amici* believes that deference should be shown to a coordinate branch acting regularly and under specific constitutional grants of power, there is no doubt, and the Court has recently reaffirmed, that "'(i)t is emphatically the province and duty of the judicial department to say what the law is,'" *United States* v. *Nixon,* 418 U.S. 683, 703 (1974), *quoting Marbury* v. *Madison,* 1 Cranch 137, 177 (1803), even as to the scope and exercise of a coordinate branch's authority.

Finally, the Court in *Brewster,* citing to precedents over 100 years old, 408 U.S. at 520 n.14, expressed skepticism that "the triers would be wholly objective and free from considerations of party and politics and the passions of the moment," *id.,* and suggested further that congressional trials conducted by an "entrenched majority from one political party could

result in far greater harrassment than a conventional criminal trial with the wide range of procedural protections for the accused . . . " *id.*

The record of more recent disciplinary efforts fails to reveal evidence of the kind of partisanship and political opportunism which the Court fears. Certainly the record compiled during the Korean Influence Investigation is devoid of any evidence of favoritism toward Members of the majority party or abuse of Members of the minority party.[7] Nor does the minority itself perceive that the majority has, in exercising its responsibility under the Constitution and Rules of the House, breached any principle of fairness or carried out their functions except with the highest sense of duty. In commenting upon the conduct of the majority during the course of an investigation under the Article I, § 5 power of the House to judge the elections of its Members, the minority extolled the Chairman and majority Member of the panel charged with undertaking the investigation:

> "I want to take this opportunity to express my deepest respect and gratitude to Chairman Davis and Representative Gaydos for the way they undertook this task. . . . There was no partisanship displayed at any time during the course of the investigation and I feel it must be said that this panel approached this responsibil-

[7] Of the sitting Members as to whom the Committee instituted disciplinary proceedings, all four were Members of the majority party, and as to sitting Members who were investigated as to whom no charges were lodged, all seven were members of the majority. With respect to the former Members who were allegedly given cash contributions by Korean representatives, three of five were members of the majority.

> ity in a non-partisan manner which exceeded even the standards of bi-partisanship." REPORT OF THE SPECIAL AD HOC PANEL OF THE COMM. ON HOUSE ADMINISTRATION ON THE SECOND DEMOCRATIC PRIMARY ELECTION HELD ON OCT. 2, 1976 FOR THE U.S. HOUSE OF REPRESENTATIVES FROM THE FIRST CONG. DISTRICT OF LOUISIANA, 95TH CONG., 1ST SESS. 11 (COMM. PRINT NO. 2 1977) (SUPPLEMENTAL VIEWS OF REP. BADHAM).

The Member reiterated this view later:

> "[W]e have shown that the House is willing and eager to consider on the merits challenges to the virtue of the House and no considerations of sectionalism, partisanship, or favoritism have any place in the consideration of a question of this import." *Id.* at 14.

It is also noteworthy that the panoply of safeguards described earlier, *supra* at 21, applied at all stages of the Korean Influence Investigation. *See, for example,* In the Matter of Representative John J. McFall, H.R. Rep. No. 95–1742, 95th Cong. 2d Sess. 1–4 (1978). A review of the extensive legal and factual argumentation presented during this case belies any notion that judgment was rendered precipitately or without regard to the rights of the accused.[8]

[8] The report, together with exhibits, including the Committee's and Respondent's Proposed Findings of Fact and Conclusions of Law, the Answer of respondent, as well as respondent's motion to dismiss the statement of alleged violation and the response of the staff thereto, together with the transcript of hearings, argument and the decision of the Committee, runs 446 pages in all. H.R. Rep. No. 95–1742, *supra.*

Amici submit that the recent conduct of the House in pursuance of its Article I, § 5 power not only complied with rigorous standards of fairness and fundamental rights, but is exemplary of the ability and willingness of the House "to investigate itself," *Final Report, supra* at 6, through an abundance of "justice with law."

II. AN INDICTMENT BASED ON GRAND JURY REVIEW OF SPECIFIC LEGISLATIVE ACTS IS DEFECTIVE AND CANNOT STAND CONSISTENT WITH THE SPEECH OR DEBATE CLAUSE.

A. THIS COURT'S HOLDINGS IN *COSTELLO* AND *CALANDRA* DO NOT REQUIRE THE DENIAL OF DEFENDANT HELSTOSKI'S MOTION FOR WRIT OF MANDAMUS.

The District Court found "untenable" Defendant Helstoski's contention that the first four counts of the indictment should be dismissed because the grand jury heard evidence regarding his legislative acts. *United States,* v. *Helstoski,* No. 76–201 (D.N.J., Feb. 22, 1977) (unpublished opinion) Pet. for Cert., No. 78–349, App. at 42a.

Judge Meanor, in so holding, placed primary reliance on the denial of a similar motion made by Congressman Johnson upon demand, by this Court, of his cured indictment for a new trial. *United States* v. *Johnson,* 419 F.2d 56 (4th Cir. 1969), *cert. denied,* 397 U.S. 1010 (1970) (hereinafter referred to as *"Johnson II"*). The district court further relied on

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this Court's holdings in *Costello* v. *United States,* 350 U.S. 359 (1956) (the only case cited in the pertinent portion of the body of the opinion by the Fourth Circuit in *Johnson II, supra*), and in the more recent *United States* v. *Calandra,* 414 U.S. 338 (1974).

Similarly, these three cases provide the essence of the reasoning employed by the Court of Appeals for the Third Circuit in holding that "it is far from 'clear and indisputable' that defendant [Helstoski] could prevail on his argument that presentation to the grand jury of evidence in violation of the Speech or Debate Clause required dismissal of the indictment." *United States* v. *Helstoski,* 576 F. 2d 511, 519 (3rd Cir. 1978).

As noted above, this Court denied certiorari in the one previous case which directly posed the question of the validity of an indictment of a Member of Congress produced by a grand jury which had been presented with evidence of the legislator's legislative conduct. *United States* v. *Johnson, cert. denied,* 397 U.S. 1010 (1970). This portion of Helstoski's petition therefore presents, as a case of first impression, an opportunity to decide if the Speech or Debate Clause requires the dismissal of an indictment which facially and conclusively indicates that the grand jury was presented with speech or debate material, in order to give effect to the constitutional policy upon which the Clause is premised.

The courts below, both in *Johnson II, supra,* and the instant case, have misread the holdings in *Costello* v. *United States, supra,* and *United States* v.

Calandra, supra, as being dispositive of this question. However, as will be shown, neither case is on point.

Costello v. *United States, supra,* arose from an indictment of defendant Costello for tax evasion. The prosecution, in its case-in-chief, introduced the testimony of 144 witnesses, and 368 exhibits, all relating to business transactions and expenditures by the defendant and his spouse. To conclude their presentation the prosecution called three government investigative agents who summarized the evidence already adduced at trial and testified as to their accounting computations which were introduced as evidence that the defendant and his spouse had received income far in excess of that which they had declared. Defense counsel, in cross-examination, questioned each of the 147 prosecution witnesses as to whether they had appeared before the grand jury. As the Court noted, "This cross-examination developed the fact that the three investigating officers had been the only witnesses before the grand jury." *Costello* v. *United States, supra* at 361.

Upon the conclusion of the prosecution's case the defendant sought dismissal of the indictment on the ground that since the only testimony received by the grand jury had been hearsay, and since hearsay testimony is incompetent, the grand jury was without authority to return an indictment. The trial court denied the motion for dismissal of the indictment. The trial proceeded and Costello was later convicted. The Court of Appeals, having found that the only evidence presented to the grand jury was hearsay, affirmed the

denial of the motion for dismissal of the indictment, holding that an indictment was valid even though the sole evidence before the grand jury was hearsay. *Costello* v. *United States,* 221 F. 2d 668 (2d Cir. 1955).

This Court upheld the lower court's opinion declaring that while incompetent evidence could be excluded at trial, the Fifth Amendment did not require the vacating of a grand jury's indictment by reason of the incompetency of the evidence heard. Justice Black, recalling the English historical antecedents, stated that, "It [a rule allowing a challenge to an indictment based upon the "competency of evidence"] would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." *Costello* v. *United States,* 350 U.S. at 364. This Court held that the protection against the use of incompetent evidence, deriving as it does from the Fifth Amendment, could properly be applied at trial and that, as quoted by the court below in the instant case, "The Fifth Amendment requires nothing more." *Costello* v. *United States, supra* at 363. See Pet. for Cert., No. 73-349, App. at 43a.

However, the prohibition against extra-legislative questioning contained in the Speech or Debate Clause, and the policies and history which it embodies, is different in nature from the ban on the use of incompetent evidence. The question presented to this Court today is not whether the Fifth Amendment requires the vacating of the indictment, but whether the Speech or Debate Clause requires such a dismissal. Moreover, as will be shown later, the history of the interaction between the English Speech or Debate privilege and their judicial system clearly indicates that English Constitutional law, the breeding ground of both the Speech or Debate privilege and the grand jury system of pre-trial accusations, does not allow an indictment to be brought against a legislator on the basis of evidence falling within the scope of the privilege.

The "hearsay" evidence presented to the *Costello* grand jury was tainted in that, as hearsay, there were questions raised as to its veracity. The present controversy raises questions of a totally different nature. No one argues that Mr. Helstoski, as a Member of the House of Representatives, did not introduce the bills presented to the grand jury. This is not a situation analogous to *Costello,* and what was viewed in that situation as an adequate protection—the ability to challenge the competency of testimony at trial—is inappropriate here. It needs to be remembered that the Speech or Debate Clause protects not simply the procedural rights of individual Members of Congress, but rather the right of this nation and its citizens to have an independent legislature secure in its freedom of speech or debate.

That the introduction of speech or debate material to a grand jury for the purpose of investigating and indicting a Member of Congress would be injurious to the interests which the Clause seeks to protect is, as was held in *Gravel* v. *United States,* 408 U.S. 606, 615 (1972), "incontrovertible."

It is inconceivable that this Court would fashion a rule which would allow the intimidation of legislators by allowing a prosecutor to seek and obtain an indictment without regard to the constitutional Speech or Debate privilege. Similarly, the fear of abuse and delay of the judicial system resulting from a rule allowing a pre-trial challenge to an indictment on the basis of the "competency" of evidence presented to the grand jury which prompted the holding in *Costello* simply is not realistic or substantial enough to warrant application of the policy of Costello to the limited occasions when a Member of Congress is called before the judiciary on the basis of an indictment returned by a grand jury which had presented to it legislative material.

Moreover, that the courts would sanction the bringing of indictments by prosecutors against legislators using Speech or Debate material only to be thwarted at trial in going forward with the case, or reversed upon appeal, hardly squares with modern notions of the administration of justice or economy and efficiency of judicial resources. Of course, after indictment, as in this case, the political death blow may have already been dealt at the polls—precisely the reason the Clause was inserted in the Constitution as a "prophylactic" measure to prevent the Executive from ridding the legislature of disfavored legislators. Any transgression of the immunity conferred by the Clause should be corrected at the earliest possible juncture, in this case by a dismissal of the offensive indictments.

Thus, this case differs in almost every material as-

pect from *Costello* in that it is a Speech or Debate case as opposed to a hearsay evidence case; in that there is no reason to fear that allowing pretrial challenges will cause major abuse or delays of the criminal justice system; in that the English historical references will show that this type of case, free speech or debate by legislators, was outside the jurisdiction of the English grand juries; and finally that the very reasons which moved the Framers of the Constitution to include an explicit Speech or Debate privilege in the body of the Constitution provides the "persuasive reasons" for dismissal found lacking, by this Court, in *Costello*. Therefore, this Court should not rely on the holding in *Costello* and should likewise go beyond the Fourth Circuit's ruling in *Johnson II* which relied, in pertinent part, solely on *Costello* v. *United States, supra.*

The lower courts, and the Department of Justice, also attributed great precedential value to this Court's holding in *United States* v. *Calandra,* 414 U.S. 383 (1974). Judge Meanor cited *Calandra* for the proposition that "the validity of an indictment is not affected by the character of the evidence considered [by the Grand Jury]." *United States* v. *Helstoski,* No. 76–201 (D. N.J., Feb. 22, 1977) (unpublished opinion) Pet. for Cert. No. 78–349, App. at 43a, *quoting United States* v. *Calandra, supra at* 344–45. In *Calandra* this Court refused to apply the exclusionary rule of the Fourth Amendment to grand jury proceedings. The Court reviewed the role of the court-

fashioned exclusionary rule established in *Weeks* v. *United States,* 232 U.S. 383 (1914), and *Mapp* v. *Ohio,* 367 U.S. 643 (1961), and stated that:

> "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> > '[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.' *Linkletter* v. *Walker,* 381 U.S. 618, 637 (1965).
>
> Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:
>
> > 'The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins* v. *United States,* 36 U.S. 206, 217 (1960).
>
> In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra, supra* at 347–48.

The privileges and protections afforded our legislators in the Speech or Debate Clause, and its underlying purpose, render it vastly dissimilar to the court-fashioned exclusionary rule for illegally seized material.

The intimidation of a single legislator, achieved

by the executive branch presenting evidence as to the legislator's legislative activity to a grand jury which has targeted the Member of Congress in a criminal investigation, is violative of the Speech or Debate Clause. Unlike the court-fashioned exclusionary rule, the Clause does not only seek to deter future violations, but to bar present ones.

Thus, while this Court was unwilling to fashion a protective order to prevent the grand jury from questioning Mr. Calandra as to the illegally seized evidence, this Court affirmed the use of a protective order to effect the Speech or Debate Clause with respect to Senator Gravel and his aide. *Gravel* v. *United States,* 408 U.S. at 628–629. *Calandra* should not be read to overrule the determination in *Gravel,* but that is the practical effect of the use of *Calandra* as applied to the instant case by the lower courts and urged on this Court by the Department of Justice.

The same Court of Appeals whose ruling is at issue here has had a more recent opportunity to examine the relationship between *Calandra* and the Speech or Debate Clause in a ruling on a claim of legislative privilege for the telephone toll records of a Member of Congress who was the target of a grand jury probe:

> "The exclusionary rule, Justice Powell reasoned [in *Calandra*], is merely a nonconstitutional prophylactic rule aimed at future violations. 414 U.S. at 354. Under the Speech or Debate Clause, however, the constitutional

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> violation is the use of legislative acts against a legislator. Unlike a violation of the Fourth Amendment, which the *Calandra* Court held to be a *past* abuse and thus the lawful basis for subsequent grand jury questioning, it is the very act of questioning that triggers the protections of the Speech or Debate Clause."

In Re: Grand Jury Investigation, No. 78–1755 (3rd Cir., Oct. 20, 1978, *rehearing denied* Jan. 9, 1979), slip op. at 15 (emphasis in original).

Justice Powell in *Calandra* followed Justice Black's lead in *Costello* by reviewing the English antecedents of our grand jury system and its "special role in insuring fair and effective law enforcement." *United States* v. *Calandra, supra* at 343. As was noted in the discussion of *Costello,* the policy reasons for protecting the sanctity of the grand jury process are inapplicable here, and the English precedents demonstrate that the judicial system which gave rise to both the concept of grand juries and the protection of legislative Speech or Debate allow vacating a pre-trial indictment of a legislator based upon evidence of legislative activity. *Ex Parte Wason,* 4 QB 573 (1869). *And see* Part II.B, *infra* at 40.

Contrary to the Department of Justice's contention, adopted by both courts below, that the language used in *Calandra* bars any pre-trial dismissal of an indictment returned by a legally constituted grand jury, there are times when courts will review the evidence relied on by a grand jury in determining whether to dismiss an indictment. Justice Powell, in *Calandra,* relied on the holdings in *Costello* v. *United States* (in-

competent hearsay evidence), *supra,* and *Lawn* v. *United States,* 355 U.S. 339 (Fifth Amendment), to maintain that "the validity of an indictment is not affected by the character of the evidence considered." *United States* v. *Calandra, supra,* at 344–45. While *Calandra* extended the prohibition of looking behind the indictment to include cases arising out of claims based on the Fourth Amendment, it has not served to prevent challenges to the validity of an indictment based on improper use of statutorily immunized testimony, a situation more closely approximating that presented here.

The U.S. Court of Appeals for the Second Circuit has interpreted this Court's ruling in *Kastigar* v. *United States,* 406 U.S. 441 (1972), to place "upon the government a heavy burden of proving that the indictment did not stem from information given to the grand jury [under a grant of transactional immunity.]." *United States* v. *Catalano,* 491 F. 2d 268, 272 (2nd Cir. 1974).

The dictum in *Calandra* has not been read to prevent a court from dismissing an indictment where the court feels the grand jury received evidence tainted by virtue of a grant of statutory immunity. In *United States* v. *Kurzer,* 422 F. Supp. 487 (S.D.N.Y. 1976), the court concluded that, "The government has not met its burden of establishing that . . . Kurzer's indictment did not derive directly or indirectly from his immunized testimony." Having so found, the district court proceeded to dismiss the indictment. *United States* v. *Kurzer, supra* at 490.

Similarly the Second Circuit has maintained that, "When an indictment is the product of the immunized testimony it must be dismissed so far as substantive offenses are concerned." *United States* v. *Anzalone,* 555 F. 2d 317, 319 (2d Cir. 1977).

That Circuit has considered and rejected the contention that the dictum in *Calandra* specifically prevents a pre-trial dismissal of an indictment "tainted" by immunized testimony. *United States* v. *Hinton,* 543 F.2d 1002, 1008 n.7 (2d Cir. 1977). In *Hinton* the court found that, "The alternative of convening a grand jury distinct from that which heard the immunized testimony is not so onerous as to justify the jeopardizing of a defendant's Fifth Amendment rights." *United States* v. *Hinton, supra* at 1010. In the instant case the use of the multiple grand juries afforded the prosecutor an opportunity to meet this burden without any difficulty at all. The prosecutor's decision not to separate out evidence covered by the Speech or Debate Clause, where the ready opportunity existed, should not be condoned. The protections afforded to a person who enjoys a statutory immunity should not be placed on a higher plane than the protections afforded by the specific constitutional grant of immunity contained in the Speech or Debate Clause.

Other circuits faced with a motion to dismiss or quash an indictment on the grounds that it was the product of grand jury use of immunized testimony have refused to do so, not because such improper use

of immunized testimony would not require dismissal, but upon a finding that the government had met its burden of proving independent non-immunized sources of the information presented to the grand jury, *United States* v. *First Western State Bank of Minot,* 491 F.2d 780 (8th Cir. 1974); that the prosecutor should be given a pre-dismissal opportunity to meet the heavy burden of showing that the immunized testimony was not used in any respect, *United States* v. *DeDiego,* 511 F.2d 818 (D.C. Cir. 1975); and that the record was barren as to any proof that the grand jury relied on immunized testimony in voting to return an indictment, *United States* v. *Apfelbaum,* 584 F.2d 1264 (3rd. Cir. 1978).

It has been said that statutory "immunity is generally offered as a device to secure information on criminal activity committed by those in privy with or those acting in concert with the immunized witness." *United States* v. *First Western State Bank of Minot, supra* at 782. Contrasting this purpose with the important constitutional and historical purposes of the Speech or Debate Clause certainly argues for the proposition that the courts should effect the protections of the Clause at least as early in the proceedings as a recepient of statutory immunity is allowed to invoke his protections.

Inherent in the lower courts' treatment of the Speech or Debate aspects of this case, refusing to dismiss the indictment while suppressing the use of protected material at trial and inviting an appeal from a final judgment, *see United States* v. *Helstoski,* 576

F. 2d at 519, is the assumption that the protection of the Speech or Debate Clause does not attach until trial or beyond. Any person even remotely cognizant of the workings of the American political process cannot deny the adverse impact of an indictment on a public official's electoral fortunes. The Speech or Debate Clause was developed in a judicial system which was at the same time developing a system of pre-trial grand jury and magistrate "indictments." [For a discussion of the historical development of the grand jury system, *see Costello* v. *United States, supra,* and *United States* v. *Calandra, supra*]. It is therefore informative to review the English precedents to see at what stage the protections of the Clause attach in the English system.

B. THE ENGLISH PRECEDENTS SUPPORT THE CONTENTION THAT AN INDICTMENT VIOLATIVE OF THE SPEECH OR DEBATE CLAUSE CANNOT STAND.

Ex Parte Wason, 4 QB 573 (1869), has been cited by this Court as indicative of the modern scope of the English Speech or Debate Clause, *United States* v. *Johnson,* 383 U.S. 169, 183; *United States* v. *Brewster,* 408 U.S. at 509 (*see also* dissenting opinions, Brennan and White, JJ., at 539 and 562). *Ex Parte Wason* arose from the refusal of a magistrate, sitting as a pre-trial indicting authority, to issue an indictment of three persons, two of them being Members of Parliament, on the charge that they had conspired to make false statements to Parliament. The magistrate refused to issue the indictment, and the Queen's Bench upheld his refusal, on the basis that an

indictment could not be granted where the petition facially referred to overt acts which were speeches in Parliament. *Ex Parte Wason, supra* at 575 (Cockburn, CJ.). While members of this Court have disagreed as to the precedential value of *Ex Parte Wason, supra,* when it is offered as indicative of the type of activity which is covered by the Speech or Debate Clause, there should be no doubt regarding its value as indicating at what stage of the criminal proceedings the protection attaches. The attacks upon *Wason* are grounded in the fact that the allegedly false speeches were given to a Parliament sitting as a court of impeachment. That distinction is irrelevant for the present usage of *Wason.*

That *Ex Parte Wason* was accepted as support for the proposition that an indictment questioning protective legislative activity was a nullity can be seen by the reliance placed on it by counsel and the court in *Dillon* v. *Balfour,* 20 L.R.Ir. 600 (1887). In seeking pre-trial dismissal of a libel action filed against a member of Parliament, the Attorney-General maintained that the provision in the Bill of Rights concerning freedom of speech and debate "clearly prohibits the bringing of any action for damages on account of speeches in Parliament, and therefore this action cannot lie. *Nor will an indictment lie even for an alleged conspiracy by members of either House of Parliament to make speeches prejudicial to a third person." Dillon* v. *Balfour, supra* at 605 (emphasis added). The pre-trial application of the privilege on

criminal matters was not questioned by the plaintiff and was affirmed by the court, which would not even entertain an amendment of the writ which purported to show an extra-parliamentary repetition of the libel. *Dillon* v. *Balfour, supra* at 619.

The early history of the operation of the English privilege also supports the contention that the privilege attaches at the earliest stage and that any criminal proceeding, even at the accusatory stage, is invalid if it is based on an activity deemed to be protected by the privilege.

The Strode's Act, 4 Hen. VIII, ch. VIII 20 (1512), 3 Stat. 9, 20 (Raithby ed. 1811) (Appendix at 26a), was passed by the Parliament in response to the imprisonment in the dungeon of the castle of Lidford of Richard Strode, a Member of the House of Commons, by a court of special jurisdiction in Steinery on the charge of interferring with the mining of tin, such interference being the introduction of a public law relating to tin mining. This 1512 act is very clear in its application at the initial stages of a criminal proceeding. Thus, Section II of the Act renders "utterly void and of none Effect" all "Acussements," "Grievances" and "Charges . . . put or had unto or upon" Richard or other Members of Parliament. Strode's Act was viewed by Members of Parliament as a significant claim of privilege, not only for Mr. Strode, but for all Members.

There has been some debate over whether Strode's Act was in the nature of a private bill, addressing the

grievances only of Mr. Strode or a public bill meant to have permanent effect. A later clash between the King and Members of Parliament which developed in 1629 provides evidence of the general and permanent effect of Strodes Act. Several members of the House of Commons expressed displeasure with the direction of King Charles I's administration. John Elliot, in a speech to the House of Commons accused the King's Council and Judges with having conspired to "trample under foot the Liberties of the Subjects." 3 How. St. Tr. 294 (1809 ed.). He warned that the King had sent instructions to the Speaker of the House of Commons to adjourn the session, by taking leave of the chair. Elliot, and several others forcibly restrained the Speaker and continued to lambast the royal administration. *Id.*

For the effrontery of their positions the King through his Attorney-General brought an indictment against Elliot and the others charging an illegal conspiracy to detain the Speaker in the chair, making of improper speeches and contempt of the King. After an initial proceeding, later dropped, in the Star Chamber, the Attorney-General presented the indictment to the King's Bench.

The defendants sought dismissal on a number of grounds, the most relevant of which was their claim that any indictment was null and void since the court was without jurisdiction to hear allegations of parliamentary misconduct. Defendants relied on the general privilege of free speech in Parliament and specifically cited the Strode's Act as supporting their contention.

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The Attorney-General countered this assertion by claiming that Strode's Act was a private act, designed solely to redress the grievances of Parliament in that particular matter. The defendants in their argument to the King's Bench offered the following evidence of the permanent effect of Strode's Act.

King Henry VIII, in formally answering the Parliament's presentation of Strode's Act in 1512, did so by invoking the form used in answering public acts *"Le roy voit"* [*The King wills it*] and not with the form used in answering a private act *"Soit droit fait al partyes"* [Let right be done to the party], *Proceedings Against Sir John Elliot, et al.,* 3 How. St. Tr. 294, 297 (1629) (argument of Mr. Mason on behalf of Sir John Elliot) (*See* Appendix at 1a). Moreover, the Act is enrolled with other public laws passed in that Parliament, and not with the separate collection of private acts. *See A Table Containing the Titles of all The Statutes, Publick and Private From the First Year of King Henry VIII to the Seventh Year of King Edward VI,* 3 Stat., *supra* at iii (Appendix at 23a).

While the Justices of the King's Bench agreed at that time with the argument advanced by Sir Robert Heath, the King's Attorney-General, that Strode's Act was of no general or permanent effect, *Proceedings Against Sir John Elliot, et al.,* 3 How. St. Tr. 294, this holding was later repudiated by specific actions of the Parliament. Thus on July 6, 1641 it was resolved that the actions taken against the Members of the House constituted a breach of the privilege of

Parliament, and the House specifically found that the showing of any information charging a Member with a crime based on his activity within Parliament was a breach of the privilege. 3 How. St. Tr. at 310.

Twenty-six years later, during the reign of King Charles II, this matter was once again addressed by Parliament. On November 12, 1669 the House of Commons, acting upon a report from the committee concerning Freedom of Speech in Parliament, resolved:

> "That the house do agree with the committee, That the act of Parliament in 4 Hen. 88, commonly entitled, An Act concerning Richard Strode, is a general law, extending to indemnify all and every the members of both houses of parliament, in all parliaments, for and touching any bills, speaking, reasoning, or declaring of any matter or matters, in and concerning the parliament to be communed and treated of, and is a declaratory law of the ancient and necessary rights and privileges of parliament."

3 How. St. Tr. 294, 314–15 (actions of parliament included by editors as an appendix to King's Bench decision in *Proceedings Against Sir John Elliot, et al.*). The House of Lords concurred in the actions taken by the Commons, 12 H.L. Jour. 224 (1668) (Appendix at 29a).

More recently, a Select Committee on Parliamentary Privilege formed by the House of Commons in 1966, having reviewed the long and arduous history of the English privilege, commented on what would occur if a member were sued in court "for defama-

tory or other wrongful statements made during a debate or 'proceeding in Parliament'. If such an action were brought, the writ would be summarily struck out if it were apparent from it that the occasion was a proceeding in Parliament. If the writ itself did not make this apparent, the action would be dismissed as soon as the fact became apparent." *Report from the Select Committee on Parliamentary Privilege,* 12 HOUSE OF COMMONS SESSIONAL PAPERS FROM COMMITTEES 143, xxiii (1967–1968).

This finding by the Select Committee was supported by the testimony of Mr. L. A. Abraham, C.B., C.B.E., former Principal Clerk of Committees, House of Commons, who testified that not only could a Member have a writ which improperly questions a Member's legislative acts struck as an abuse of process but could in fact treat the issuance of the writ as a contempt of parliamentary privilege and have the individuals involved in the issuance of the writ committed by the House of Parliament to prison. *Report from the Select Committee, supra* at 114. In fact, it is on this last point that current debate concerning parliamentary privilege now centers, not whether such a suit or indictment can be maintained in the courts, but whether or not the issuance of such a writ is a contempt of Parliament. *Report from the Select Committee, supra.*

This review of the English experience, upon which American courts have heavily relied in interpreting the scope of the Speech or Debate Clause, reveals that it is considered essential, to preserve the free-

dom of debate in Parliament, for the courts to recognize that privilege, in matters it rightfully applies to, by acting as quickly as possible to dismiss the action. Our own legislators deserve the same protection and an indictment, which on its face is the product of a grand jury which has received testimony as to legislative acts, is fatally defective.

III. THE DECISION OF THE APPEALS COURT PROHIBITING THE INTRODUCTION OF LEGISLATIVE ACTS AT TRIAL REGARDLESS OF THE PURPOSE SOUGHT TO BE ACHIEVED BY SUCH PROOF SHOULD BE AFFIRMED.

In the proceedings below, the United States Court of Appeals for the Third Circuit affirmed the district court's ruling on the inadmissability of proof of legislative acts on the part of Congressman Helstoski derived from any source and for any purpose during the presentation of the case-in-chief. *United States* v. *Helstoski,* 576 F. 2d 511, 521–522 (3rd Cir. 1978).

In both the district court and the Court of Appeals the prosecution sought a ruling to permit it "to introduce copies of private immigration bills themselves and correspondence and conversations referring to defendants legislative acts in order to prove the purpose of defendant in accepting the payments at issue." *Id.* The Department of Justice believes here, as it did below, that if it seeks merely to introduce the legislative acts to prove state of mind and guilty knowledge in allegedly taking a bribe, there is no conflict with the Speech or Debate Clause, as interpreted in *Brewster* and *Johnson,* because there is no inquiry, as a result

of proof of legislative acts for that purpose, into the legislative process itself. Pet. for Cert., No. 78-349 at 15.

The Court of Appeals rejected this argument and stated:

> "It is true that *Brewster* did not foreclose the showing of the purpose in taking the bribe. But the Supreme Court in *Brewster* made clear that such purpose could be shown without inquiry 'into how [defendant] spoke, how he debated, how he voted, or anything he did in the chamber or in committee.'" *United States* v. *Helstoski,* 576 F. 2d at 522, *quoting United States* v. *Brewster,* 408 U.S. 501, 526 (1972).

At the nub of this case is an attempt by the Department to reduce the Speech or Debate Clause to an empty and meaningless platitude deprived of the vitality with which it is intended to function. The notion that by merely professing a desire to introduce evidence of legislative conduct for what the prosecution feels is a legitimate purpose is antithetical to this Court's characterization of the Clause as an absolute bar to the "questioning" of Members once those acts are determined to be within the ambit of the Clause's protection, *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975). The pronouncement by this Court of the kind of holding the Department seeks presents the prospect that judicially constructed exceptions to the Clause will in time entirely swallow the rule that prohibits " 'any showing' of legislative acts," *United States* v. *Helstoski,* 576 F. 2d at 522, *quoting United States* v. *Brewster,* 408 U.S. at 527.

An element of almost every crime is the proof of guilty knowledge on the part of the accused. To permit the Department to offer legislative acts into evidence to demonstrate "state of mind," with any reference to the actual performance of the legislative act being purely "incidental", would render the Clause a nullity, allowing a legislator to be tried partially on the basis of his legislative acts, whether it be bribery, conflict of interest or any other federal criminal statute. The Clause would, under this theory, be reserved as a protection only in the unlikely eventuality that prosecutors would put themselves in a position of directly charging legislative acts.

The Department of Justice recognizes, as it must, that "prosecution of a Member of Congress under 18 U.S.C. § 201 does not require proof of the *legislative act itself.*" Brief for Appellant at 20, *United States* v. *Helstoski, supra* (emphasis added). The Department goes on immediately thereafter to quote in support of its conclusion language in *United States v. Brewster,* 408 U.S. at 526:

> "The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that [the defendant Member of Congress] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise."

Amici is puzzled as to the reasons why the Department insists it must nevertheless be enabled to introduce copies of bills and correspondence containing references to the bills into evidence when it con-

cedes that the statute does not require a showing of performance of the illegal bargain to prove the crime.

Under the bribery statute, "[t]o sustain a conviction, it is necessary to show that Appellee solicited, received or agreed to receive money with knowledge that the donor was paying him compensation for an official act. Inquiry into legislative performance is not necessary; evidence of the Member's knowledge of the alleged bribers' illicit reasons for paying the money is sufficient to carry the case to the jury." 408 U.S. at 527.

Again it is not necessary to show performance, yet this is what the Department urges apparently to make its prosecutions more compelling.

"Perhaps the Government would make a more appealing case if it could [introduce legislative acts] but . . . evidence of acts protected by the Clause is inadmissable." 408 U.S. at 528. Likewise the desire of the Department to make an appealing case does not overcome the clear and unequivocal effect of the Clause. If, as the Department suggests, in "cases such as the present case, where an administrative aide makes initial contact with the potential briber, and the Congressman deals with the briber only after the performance of the legislative act in order to demand or receive payment, there may be insufficient evidence arising before the legislative act to establish that the Congressman was a knowing participant in the scheme", Pet. for Cert., No. 78–349 at 14, then the Department has other alternatives than to violate the Clause: (1) it must rely on the evidence which is

available *and* admissable; (2) it must more diligently pursue the existence of such evidence before trial, or if this fails; (3) it must forego the small number of prosecutions which necessitate use of such evidence, particularly since bribery prosecutions of Congressman, by the Department's own admission, are "not commonplace occurrences."[9]

The particular legislative acts themselves and the correspondence and conversations referring to the legislative acts involved in this case relate to the introduction by Congressman Helstoski, and consideration by the House, of so-called "private" immigration bills. *Amici* believes that it is necessary for the Court to have before it a brief explanation of the procedures and rules governing these bills for purposes of establishing that their consideration and enactment by the House is an integral and regular part of the legislative process.

Although the "Government here concedes that Helstoski's introduction of private immigration bills constituted legislative acts," *United States* v. *Helstoski,* No. 76–201 (D. N.J., Feb. 22, 1977) (unpublished opinion), it later characterizes the case as one charging the Congressman "with having solicited and received bribes in return for the introduction of pri-

[9] The Department has stated that the Third Circuit's ruling "will make it impossible to obtain convictions in this category of cases." Pet. for Cert, No. 78–349 at 14. Again, *amici* question why the Department is intent on going to the lengths it has in bringing issues before the Court which it concedes are relevant to a very select category of cases and which involve countervailing considerations of constitutional immunity.

vate immigration bills on behalf of specified aliens residing illegally in the United States." Pet. for Cert., No. 78–546 at 2.

In recent years, the subject of illegal aliens residing in this country has become the focus of public debate and controversy and the various social and economic factors that relate to the problem is one of considerable concern to both the Congress and the citizenry. *See generally*: ILLEGAL ALIENS: ANALYSIS AND BACKGROUND, Comm. on the Judiciary, 95th Cong., 1st Sess. (Comm. Print No. 5, 1977) and *Illegal Aliens: Hearings Before the Subcomm. No. 1 of the House Comm. on the Judiciary,* 92d Cong., 1st & 2d Sess., Parts 1–5 (1971–1972).

Against this background, an allegation that a Congressman was involved in a corrupt scheme purportedly resulting in his direct pecuniary advantage in connection with private immigration legislation for a number of years adds to the already highly charged atmosphere in which the issues in such as case will be decided. In order to rebut, in anticipation, any negative connotation which might be drawn from the Department's statement that the legislative activity which occurred here related to private immigration bills, the beneficiaries of whom were illegal aliens, and to insure that any adverse rulings on the points at issue in this case do not result from permitting an erroneous impression to stand regarding the regularity and propriety of private legislation, *amici* wish to provide relevant information to the Court on this aspect of the Article I, §1 legislative power.

The power to regulate the entry and stay of aliens, as well as the process through which aliens become naturalized citizens, has traditionally been viewed as an inherent incident of national sovereignty committed exclusively to national control. "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Nishimura Ekin* v. *United States,* 142 U.S. 651, 659 (1892). See also *The Chinese Exclusion Case,* 130 U.S. 581, 603–604 (1889); *United States ex rel. Knauf* v. *Shaughnessy,* 338 U.S. 537, 542, (1950); *Carlson* v. *Landon,* 342 U.S. 524, 537 (1952); *Boutilier* v. *Immigration and Naturalization Service,* 387 U.S. 118, 123 (1967); *Kleindienst* v. *Mandel,* 408 U.S. 753, 762 (1973).

Coupled with this inherent and sovereign power possessed by the Congress to regulate the entry, stay and deportation of aliens, is the express power conferred on Congress "[t]o establish a uniform Rule of Naturalization." U.S. Const., art. I, § 8, cl. 4. It is for the purpose of carrying into execution such powers that Congress was additionally given the authority to "make all laws which shall be necessary and proper." *Id.* at cl. 18.

In introducing, considering and passing private immigration bills, the House, and the Congress, draw upon both these inherent and express constitutional sources.

With respect to their consideration in the House, the Committee on the Judiciary is given jurisdiction over immigration and naturalization and measures relating to claims against the United States. H.R. Rule X(m)(7) and (10), Rules of the House, § 682 (a) at 379. All such bills of private character are referred to the Private Calendar, one of the three basic calendars to which all business reported from committees is referred. Rule XIII, § 1, Rules of the House § 742 at 481.

It should be noted that the use of the term private bills is one of legislative nomenclature which distinguishes bills for the relief of one or more specified persons, corporations or institutions from bills which deal with individuals only by classes. 4 A. Hinds' *Precedents of the House of Representatives,* § 3285 at 247 (1907).

> "The line of distinction between public and private bills is so difficult to be defined in many cases that it must rest on the opinion of the Speaker and the details of the bill . . . . To be a private bill it must not be general in its enactments, but for the particular interest or benefit of a person or persons. A pension bill for the relief of a soldier's widow is a private bill, but a bill granting pensions to such persons as a class . . . is a public bill." *Id.*

Questions of classification are resolved through reference to long established and time honored standards. Therefore, a bill providing for the collection of tolls by certain individuals generally from the public, but which also provided for the punishment of individuals

in the courts was classed a public bill, 4 A. Hinds' *Precedents, supra* § 3286 at 249. *See also* 7 C. Cannon's *Precedents,* § 864 at 56–57 (1936).

Private bills referred to the Private Calendar are called on the first and third Tuesdays of each month and if objection is made by two or more Members to the consideration of any measure so called, it is recommitted to the reporting committee. Zinn, *How Our Laws Are Made,* H.R. Doc. No. 94–509, 94th Cong., 2d Sess. 21 (1976).

During the Ninety-Fifth Congress a total of 908 private bills and resolutions were referred to the Committee on the Judiciary, 546 of which related to private immigration and nationality, and in all 161 private bills were enacted into law. Report on the Activities of the Judiciary Comm. Pursuant to Clause 1(d) Rule XI of the Rules of the House of Representatives, H.R. Rep. No. 95–1827, 95th Cong., 2d Sess. 5–6 (1978). In addition, the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary held 13 meetings on private immigration and nationality bills. *Id.* at 20.

While the foregoing precedents, rules and procedures are not directly at issue here, any modification of the Third Circuit's ruling on the admissability of private bills would have the same effect with respect to the much larger number of public bills introduced in and considered by the House. Since the House considers private bills in much the same manner that public bills are treated, with the minor differences

noted in this brief discussion, reversal of the Third Circuit's holding on the admissability of the bills would have far ranging impact not only on the Member's Speech or Debate Clause protection but on the legislative process in general. Were Members to respond to any such ruling by declining to introduce much needed or innovative legislation for fear of being "questioned" for those acts by the Executive, the legislative process as we now know it is likely to become drastically curtailed and stifled.

In addition, it should be noted that the correspondence to the beneficiaries of the private immigration bills falls into a different category than the " 'newsletters' to constituents, news releases and speeches delivered outside Congress" which the Court in *Brewster,* 408 U.S., at 512 indicated were not pure protected legislative activities. These letters are more in the nature of legislative communications closely akin to, for example, a letter from the Chairman of the Armed Services Committee to the Secretary of the Department of Defense relating to military authorizations for the armed forces. Moreover, letters to beneficiaries of private bills by the sponsoring Member regarding their introduction or action thereon by committee or the House can hardly be classed, along with newsletters or speeches, as a "means of developing continuing support for future elections," *id.,* since none of the beneficiaries would be capable, as aliens, of voting or otherwise participating in the elective process. *See for example*: 2 U.S.C. § 441e(a),

prohibiting foreign nationals from making financial contributions to political campaigns.

Moreover, as has been outlined earlier, the introduction and passage of private immigration bills is an exercise of express constitutional authority conferred on Congress. Therefore, the introduction of those bills and correspondence to beneficiaries concerning those bills necessary to foster informed consideration by the House are clearly acts "generally done in a session of the House by one of its Members in relation to the business before it," *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881) or things "said or done by him, as a representative, in the exercise of the functions of that office," *Coffin* v. *Coffin,* 4 Mass. 1, 27 (1808).

The assertion by the Department that a Member may be accountable for telling people outside Congress why he spoke and voted as he did, Pet. for Cert., No. 78–349 at 20, *citing* Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers,* 86 Harv. L. Rev. 1113, 1163 (1973), is inapposite to the situation here, where the persons being informed by the Member of legislative action on their behalf had an interest above and beyond the general public interest which constituents have in the activities of a Congressman. In fact, it is not clear through what channel the beneficiaries would obtain knowledge of the activities of the House on the bills of which they were beneficiaries other than through the sponsoring Member acting as liaison.

IV. THE PROTECTION OF ARTICLE I, SECTION 6, OF THE UNITED STATES CONSTITUTION—THE SPEECH OR DEBATE CLAUSE—CANNOT BE WAIVED; ANY JUDICIALLY FASHIONED DOCTRINE OF WAIVER SHOULD BE A STRICTLY LIMITED AND PRECISELY DEFINED ONE.

In the almost 200 years since the Speech or Debate Clause came into existence in its present form, *amici* are unaware of any court—State or Federal—which has held that the Constitutional prohibition against "questioning" a Member of Congress about his legislative acts is merely a personal privilege which can be waived and that failure to object on one occasion of its violation causes the protection to disappear on all future occasions when either the Executive or Judicial Branches—or both in combination—wish to repeat their inquiries into what a legislator has done, *qua* legislator, and his motives for so doing. Nor have the British courts developed such a doctrine over the many centuries preceding and following the express statement of a Speech and Debate protection for Members of Parliament in the English Bill of Rights of 1688.[10]

[10] 1 W. & M., Sess. 2, c. 2. The English Bill of Rights' Speech and Debate Clause declares "that the Freedom of Speech and Debate or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament." This language was almost exactly adopted in Article V of the Articles of Confederation: "freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress * * *." Article I, Section 6 of the Constitution, of course, reads: "* * * and for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other place."

The reason for this lack of any "waiver" gloss concerning the Speech or Debate protection is fundamental and stems from the unique purpose of the Clause to preserve and foster the complete separation and independence of the Legislative Branch, insofar as purely legislative acts are concerned, from its sisters, the Executive and Judicial. The protection afforded is not merely personal (as, *for example,* the Fifth Amendment privilege against *self*-incrimination), nor is it fundamentally an evidentiary privilege designed to preserve valuable confidential relationships (*for example,* husband-wife, attorney-client, physician-patient, priest-penitent). *See* District Judge Meanor's opinion below, Pet. for Cert., No. 78–349, at 51a–58a.

Amici respectfully submit that the Speech or Debate prohibition—or privilege, if you will—is more institutional than personal, and its breach impinges at least as much upon the domain of the Congress as a body as it does upon the individual member who is being subjected to inquisition. As this Court stated in *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975):

> "* * * once it is determined that members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an *absolute bar* to interference." (Emphasis added.)

The prohibition thus being absolute, and expressly stated in the body of the Constitution, it is clearly more in the nature of a flat jurisdictional bar on the powers of the Executive and Judicial Branches of the

Government than it is a personal privilege that can be waived by an individual Member of Congress. Certainly it can not be contended that either the President, or this Court, or that Congress as a body can "waive" the separation of governmental powers which the Constitution itself decrees. How, then, can an individual Member of Congress do so on his own? Just as parties to a law suit before this Court can not by agreement or "waiver" confer jurisdiction on the Court to act where Article III prohibits such action,[11] so also former Representative Helstoski, as a party to this law suit, can not by his actions alone confer power on the Department of Justice or the District Court below to inquire into matters which the Constitution states that the Executive and Judiciary shall not inquire into.

For these reasons, *amici* respectfully submit that the prohibition of Article I, Section 6 of the Constitution, i.e., the Speech or Debate Clause, on the powers of the Executive and Judicial Branches of the Government is not waiveable either by an individual Member of Congress acting alone, or by such individual Member acting in conjunction with the House of which he is a Member, or by such individual acting

[11] Neither, of course, can Congress and the President confer such jurisdiction on this Court. *Marbury* v. *Madison*, 1 Cranch 137 (1803).

in conjunction with the Congress.[12] In short, the answer to the second Question posed in the Department of Justice's petition for a writ of certiorari in No. 78–349, at 2, should be answered in the negative.[13]

Should this Court, however, decide to go down the road of erosion by fashioning at this late date a doctrine of waiver concerning the Speech or Debate Clause, as the Department of Justice now urges, *amici* respectfully suggest that, in deference to the fundamental policy underlying the Clause of protecting the separation and independence of the national Legislature from a possibly hostile Executive or Judiciary, any such doctrine of waiver should be a strict and precisely limited one. Thus, if the protection is waiveable at all, it should be only under the following con-

[12] It is true, of course, that a violation of the Speech or Debate prohibition may be triggered by the combination of a failure to object on the part of an individual Congressman and a lack of self-restraint on the part of a prosecutor or private plaintiff in a law suit. Thus, this Court has said that legislators are not "absolved of the responsibility of filing a motion to dismiss" should they be sued on the basis of their legislative acts. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 511 n. 17 (1975), *quoting Powell* v. *McCormack*, 395 U.S. 486, 505 n. 25 (1969). But such an inadvertent, unapposed transgression by one Branch on the domain of another Branch, while regrettable, is not of Constitutional significance. It is sufficient to remedy the transgression when objection is raised.

[13] The Question Presented is as follows: "2. Whether the voluntary giving of testimony and production of documents before a grand jury by a Congressman who is aware of but does not invoke the Speech or Debate Clause privilege constitutes a waiver of that privilege with respect to use of those documents and that testimony at the trial of an indictment returned by the grand jury, when there has been no express authorization by the Congressman of such use."

ditions (some but not all of which were referred to by the courts below in rejecting the claim of waiver in this case):

1. Any waiver should be an express waiver of the Speech or Debate protection after due warning of its possible application. Both courts below so ruled.

2. Any waiver should require the concurrent acquiessence of both the individual Member of Congress and of Congress itself; or at least of the House to which the Member belongs.

3. Any waiver should apply only to the proceedings at which the waiver is made, e.g., a waiver at an administrative agency hearing or before an Executive department or officer should not constitute a waiver in a subsequent private civil suit. Similarly, a waiver before one grand jury should not constitute a waiver before a different or subsequent grand jury or for purposes of a subsequent trial before a petit jury or judge. Here, for example, at least nine separate grand juries were investigating Congressman Helstoski's activities. He appeared before some of these and testified, without objection, as to some of his legislative actions. But no grand jury before which he testified indicted him. And he did not appear or testify before the grand jury that returned the indictment that initiated this case.[14] It is therefore submitted that any waiver, arguably committed by Congressman Helstoski

[14] The phrasing of the Department of Justice's Question No. 2 in its petition for a writ of certiorari in No. 78-349, at 2, to the extent that it implies otherwise, is in error.

at his earlier appearances before other grand juries that did not indict him, should not be deemed to spill over and apply to this case.

CONCLUSION

In conclusion, *Amici* asks the Court to consider the views and authorities presented herein in formulating its opinion and judgment in this case.

Respectfully submitted,

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February 8, 1979

190. Proceedings against Sir JOHN ELLIOT, DENZIL HOLLIS, esq. and BENJAMIN VALENTINE, esq. for seditious Speeches in Parliament: in B. R. Mich. 5 CHARLES I. A. D. 1629.*

SIR Robert Heath, the king's Attorney-General, exhibited informations in this court against sir John Elliot, knight, Denzil Hollis, and Benjamin Valentine, esqrs. the effect of which was,† That the king that now is, for weighty causes, such a day and year, did summon a parliament, and to that purpose sent his writ to the sheriff of Cornwall to chuse two knights: by virtue whereof sir John Elliot was chosen and returned knight for Cornwall. And that in the same manner, the other defendants were elected burgesses of other places, for the same parliament. And shewed further, that sir John Finch was chosen for one of the citizens of Canterbury, and was Speaker of the house of commons. And that the said Elliot publicly and maliciously in the house of commons, to raise sedition between the king, his nobles, and people, uttered these words, 'That 'the Council and Judges had all conspired to 'trample under foot the Liberties of the Sub-'jects.' He further shewed, that the king had power to call, adjourn, and dissolve parliaments: and that the king, for divers reasons, had a purpose to have the house of commons adjourned, and gave direction to sir John Finch, then the Speaker, to move an adjournment; and if it should not be obeyed, that he should forthwith come from the house to the king. And that the Defendants, by confederacy aforehand, spake a long and continued speech, which was recited *verbatim*, in which were divers malicious and seditious words, of dangerous consequence. And to the intent that they might not be prevented of uttering their premeditate speeches, their intention was, that the Speaker should not go out of the Chair till they had spoken them; the Defendants, Hollis and Valentine, laid violent hands upon the Speaker, to the great affrightment and disturbance of the house. And the Speaker being got out of the Chair, they by violence set him in the Chair again; so that there was a great tumult in the house. And after the said speeches pronounced by sir John Elliot, Hollis did recapitulate them.

And to this Information,

The Defendants put in a Plea to the Jurisdiction of the court, because 'these offences 'are supposed to be done in parliament, and 'ought not to be punished in this court, or in 'any other, but in parliament.'

And the Attorney-General moved the Court, to over-rule the plea to the jurisdiction. And that, he said, the court might do, although he had not demurred upon the plea. But the court would not over-rule the plea, but gave day to join in demurrer this term. And on the first day of the next term, the record shall be read, and within a day after shall be argued at bar.

Hyde, Chief-Justice, said to the counsel of the Defendants; So far light we will give you: this is no new question, but all the Judges in England, and Barons of the Exchequer, before now, have oft been assembled on this occasion, and have, with great patience, heard the arguments on both sides; and it was resolved by them all with one voice, That an offence committed in parliament, criminally or contemptuously, the parliament being ended, rests punishable in another court.

Jones. It is true, that we all resolved, That an offence committed in parliament against the crown, is punishable after the parliament in another court; and what court shall that be, but the court of the King's-bench, in which the king, by intendment, sitteth?

Whitlocke. The question is now reduced to a

* The king at first intended to proceed against the above gentlemen in the Star-Chamber, to which end an Information was exhibited against them in that court, on the 7th of May; but that being dropped, they were proceeded against in the King's-bench, and the same matters in effect were set forth as in the Information in the Star-Chamber.

† See the Information in the King's-bench, the Defendant's Plea, the Attorney-General's Demurrer, &c. at large, at the end of the Case, upon occasion of the Reversion of the Judgment in B. R. by the House of Lords on a Writ of Error, A. D. 1668.

narrow room, for all the Judges are agreed, That an offence committed in parliament against the king or his government, may be punished out of parliament. So that the sole doubt which now remains, is, whether this court can punish it.

Croke agreed, That so it had been resolved by all the Judges, because otherwise there would be a failure of justice. And by him, if such an offence be punishable in another court, what court shall punish it but this court, which is the highest court in the realm for criminal offences? And perhaps not only criminal actions committed in parliament are punishable here, but civil also.

Mr. *Mason* of Lincoln's-Inn argued for sir John Eliot, one of the Defendants. The charges in the Information against him are three:

1. For Speeches.

2. For Contempts to the King, in resisting the Adjournment.

3. For Conspiracy with the other Defendants, to detain Mr. Speaker in the Chair.

In the discussion of these matters, he argued much to the same intent he had argued before, therefore his argument is reported here very briefly.

1. For his Speeches, they contain matter of accusation against some great peers of the realm; and as to them, he said, that the king cannot take notice of them. The Parliament is a Council, and the Grand Council of the king; and councils are secret and close, none other have access to those councils of parliament, and they themselves ought not to impart them without the consent of the whole house. A Jury in a leet, which is sworn to inquire of offences within the said jurisdiction, are sworn to keep their own counsel; so the house of commons inquire of all grievances within the kingdom, and their counsels are not to be revealed. And to this purpose was a Petition, 2 H. 4, n. 10. That the king shall not give credit to any private reports of their proceedings, to which the king assents: therefore the king ought not to give credit to the information or these offences in this case. 2. The words themselves contain several accusations of great men; and the liberty of accusation hath always been parliamentary. 50 E. 3. Parliament Roll, n. 21, the lord Latimer was impeached in parliament for sundry offences. 11 R. 2, the archbishop of York; 13 H. 6, n. 18, the duke of Suffolk; 1 Mar. Dy. 93, the duke of Norfolk; 36 H. 6, n. 60, un Vickar General; 2 and 3 E. 6, c. 18. the lord Seymour; 18 of king James, the lord of St. Albans, Chancellor of England; and 21 of king James, Cranfield, Lord Treasurer; and 1 Car. the duke of Buckingham. 3. This is a privilege of parliament, which is determinable in parliament, and not elsewhere; 11 R. 2, n. 7. the Parliament Roll, a Petition exhibited in parliament, and allowed by the king. That the liberties and privileges of parliament shall only be discussed there, and not in other courts, nor by the common, nor civil law; (see this Case more at large in Selden's Notes upon Fortescue, f. 42.) 11 R. 2, Roll of the process and judgment. An appeal of Treason was exhibited against the archbishop of Canterbury and others, and that the advice of the sages of the one law and the other being required; but because the appeal concerned persons which are peers of the realm which are not tried elsewhere than in parliament, and not in an inferior court. 28 H. 4, 18. There being a question in parliament concerning precedency, between the earl of Arundel, and the earl of Devon, the opinion of the Judges being demanded, they answered, That this question ought to be determined by the parliament, and by no other. 31 H. 6, n. 26. During the prorogation of the parliament Thorp that was the Speaker, was out in execution at the suit of the duke of York; and upon the re-assembly of the parliament, the commons made suit to the king and lords to have the Speaker delivered. Upon this, the lords demanded the opinion of the Judges; who answered That they ought not to determine the privileges of the high court of parliament. 4. This accusation in parliament is in legal course of justice, and therefore the accuser shall never be impeached, 13 H. 7, and 11 Eliz. Dy. 285. For making of false deeds brought against a peer of the realm, action *de scandalis magnatum*, doth not lie. Coke's Rep. 4. 14, Cutler and Dixy's case, where divers cases are likewise put to this purpose. 35 H. 6, 15. If upon the view of the body the slayer cannot be found, the Coroner ought to enquire, Who first found the dead body? And if the first finder accuse another of the murder, that is afterward acquit, he shall not have an action upon the case, for it was done in legal manner. So it is the duty of the commons to enquire of the Grievances of the Subjects, and the causes thereof, and doing it in legal manner, 19 H. 6, 19. 8 H. 4, 6. in conspiracy it is a good plea, that he was one of three victors. And 20 H. 6, 5. that he was a good Jury-man, and informed his companions. And 21 E. 4, 6, 7. and 35 H. 6, 14. that he was Justice of Peace, and informed the Jury, 27 Ass. p. 12. is to the same purpose. And if a Justice of Peace, the first finder, a juror, or indicter shall not be punished in such cases; *à fortiori* a member of the house of commons shall not who, as 1 H. 7, is a Judge. 27 Ass. p. 44, it be objected, where two were indicted of a conspiracy, because they maintained one another but the reason of the said case was, because maintenance is a matter forbidden by the law but parliamentary accusation, which is our matter, is not forbidden by any law. Coke's 9. 56. there was a conspiracy, in procuring one to be indicted. And it is true, for there it was not his duty to prefer such accusation. (2) The accusation was extra-judicial, and out of court but it was not so in our case. (3) Words spoken in parliament, which is a superior court, cannot be questioned in this court, which is inferior 3 E. 3, 19. and Stamford 153, will be objected where the bishop of Winchester was arraigned in this court, because he departed the parliament without licence; there is but the opinion

of Scroop, and the case was entered, P. 3 E. 19. And it is to be observed, that the plea of the bishop there, was never over-ruled. From this I gather, that Scroop was not constant to his opinion, which was sudden, being in the same term in which the plea was entered; or if he were, yet the other Judges agree not with him; and also at last the bishop was discharged by the king's writ. From this I gather, that the opinion of the court was against the king, as in P. 20. in Fogassa's case, where the opinion of the court was against the king, the party was discharged by privy seal. 1 and 2 Phil. and Mar. hath been objected, where an information in this court was preferred against Mr. Plowden, and other members of the house of commons, for departing from the house without licence. But in that case I observe these matters. (1) That this information depended during all the life of the queen, and at last was *sine die*, by the death of the queen. (2) In the said case, no plea was made to the jurisdiction of the court, as here it is. (3) Some of them submitted themselves to the fine, because it was easy, for it was but 53*s.* 4*d.* But this cannot be urged as a precedent, because it never came in judgment, and no opinion of the court was delivered therein. And it is no argument, that because at that time they would not plead to the jurisdiction, therefore we now cannot if we would. (4) These offences were not done in the parliament house, but elsewhere by their absence, of which the country may take notice: but not of our matters done in parliament. And absence from parliament, is an offence against the king's summons to parliament. 20 R. 2, Parliament Roll 12. Thomas Hacksey was indicted of high treason in this court, for preferring Petition in parliament; but 1 H. 4, n. 90. he preferred a Petition to have this judgment quashed, and so it was, although the king had pardoned him before. And 1 H. 4. n. 104. all the commons made petition to the same purpose, because this tends to the destruction of their privileges. And this was likewise granted. 4 H. 8, c. 8, Strode's case, That all condemnations imposed upon one, for preferring of any Bill, speaking, or reasoning in parliament, are void. And this hath always been conceived to be a general act, because the prayers, time, words, and persons are general, and the answer is as in general; for a general act is always answered with, *Le roy voit*, and a particular act with *Soit droit fait al partyes*. And 33 H. 6, 17. 18. a general act is always inrolled, and so then is.

2. For the second matter, the Contempt to the command of the adjournment, Jac. 18. it was questioned in parliament, whether the king can adjourn the parliament, (although it be without doubt that the king can prorogue it). And the Judges resolve, that the king may adjourn the house by commission: and 27 Eliz. it was resolved accordingly. But it is to be observed, that none was then impeached for moving that question. (2.) It is to be observed, that they resolve, that the adjournment may be by commission, but not resolved that it may be by a verbal command, signified by another; and it derogates not from the king's prerogative, that he cannot so do, no more than in the case of 26 H. 8, 8. that he cannot grant one acre of land by parol. The king himself may adjourn the house in person, or under the great seal, but not by verbal message, for none is bound to give credit to such message; but when it is under the Great Seal, it is *teste meipso*. And if there was no command, then there can be no contempt in the disobedience of that command. (3) In this, no contempt appears by the information; for the information is, that the king had power to adjourn parliaments. Then put the case, the command be, that they should adjourn themselves: this is no pursuance of the power which he is supposed to have. The house may be adjourned two ways, to wit, by the king, or by the house itself: the last is their own voluntary act, which the king cannot compel, for, 'Voluntas non cogitur.'

3. For the third matter, which is the Conspiracy: although this be supposed to be out of the house, yet the act is legal; for members of the house may advise of matters out of the house: for the house itself is not so much for consultations, as for proposition of them. And 20 H. 6, 34. is, that inquests which are sworn for the king, may enquire of matters elsewhere. (2) For the Conspiracy to lay violent hands upon the Speaker, to keep him in the Chair; the house hath privilege to detain him in the Chair, and it was but lightly and softly, and other Speakers have been so served. (3) The king cannot prefer an information for trespass; for it is said, the king ought to be informed by a jury, to wit, by indictment, or presentment. (4) This cannot be any contempt, because it appears not that the house was adjourned; and if so, then the Speaker ought to remain in the chair; for without him, the house cannot be adjourned. But it may be objected, that the information is, That all these matters were done maliciously and seditiously. But to this I answer, That this is always to be understood according to the subject matter, 15 E. 4, 4. and 18 H. 8, 5. A wife that hath title to have dower, agrees with another to enter, (which hath right) that she against him may recover her dower. This shall not be called Covin, because both the parties have right and titles. (2) It will be objected, That if these matters shall not be punishable here; they shall be unpunished altogether, because the parliament is determined. To this I say, That they may be punished in the subsequent parliament, and so there shall be no failure of right. And many times matters in one parliament have been continued to another, as 4 E. 3, n. 16. the lord Berkley's Case, 50 E. 3 n. 185. 21 R. 2, c. 16. 6 H. 6, n. 45, 46. 8 H. 5, n. 12, offence in the forest ought to be punished in eyre, and eyres oftentimes were not held but every third year. C. 9. Epistle. and 36 E. 3. c. 10. A parliament may be every year. Error in this court

cannot be reversed but in parliament, and yet it was never objected, that therefore there shall be a failure of right. 25 E. 3, c. 2. If a new case of treason happen, which is doubtful, it shall not be determined till the next parliament. So in Westm. 2, c. 28. where a new case happens, in which there is no writ, stay shall be made till the next parliament. And yet in these cases, there is no failure of right. And so the judges have always done in all difficult cases; they have referred the determination of them to the next parliament, as appears by 2 E. 3, 6, 7. 1 E. 3, 8. 33 H. 6, 18. 5 E. 2. Dower 145, the case of dower of a rent-charge. And 1 Jac. the Judges refuse to deliver their opinions concerning the union of the two kingdoms. The present case is great, rare, and without precedent, therefore, not determinable but in parliament. And it is of dangerous consequence; for (1) by the same reason, all the members of the house of commons may be questioned. (2) The parties shall be disabled to make their defence, and the clerk of parliament is not bound to disclose those particulars. And by this means, the debates of a great council shall be referred to a petty jury. And the parties cannot make justification, for they cannot speak those words here, which were spoken in the parliament, without slander. And the defendants have not means to compel any to be witnesses for them; for the members of the house ought not to discover the counsel of the house: so that they are debarred of justification, evidence, and witness. Lastly, By this means, none will adventure to accuse any offender in parliament, but will rather submit himself to the common danger; for, for his pains he shall be imprisoned, and perhaps greatly fined: and if both these be unjust, yet the party so vexed can have no recompence. Therefore, &c.

The Court. The question is not now, whether these matters be offences, and whether true or false. But admitting them to be offences, the sole question is, Whether this court may punish them; so that a great part of your argument is nothing to the present question.

At another day, being the next,

Mr. *Calthorpe* (who succeeded Mr. Mason, as Recorder of London) argued for Mr. Valentine, another of the defendants:

1. In general, he said, for the nature of the crimes, that they are of four sorts: 1. In Matter. 2. In Words. 3. By Consent. 4. By Letters.

Two of them are laid to the charge of this Defendant, to wit, the crime of the Matter, and of Consent. And of offences, Bracton makes some public, some private. The offences here are public. And of them, some are capital, some not capital; as assault, conspiracy, and such like, which have not the punishment of life and death. Public crimes capital are such as are against the law of nature, as treason, murder; I will agree, that if they be committed in parliament, they may be questioned elsewhere out of parliament. But in our case, the crimes are not capital, for they are assault and conspiracy, which in many cases may be justified, as appears by 22 H. 6, Keilw. 92. 2. Ass. 3 H. 4, 10. 22 E. 4, 6. Therefore this court shall not have jurisdiction of them, for they are not against the law of nations, of God, or nature; and if these matters shall be examinable here, by consequence all actions of parliament-men may be drawn in question in this court. But it seems by these reasons, that this court shall not have jurisdiction, as this case is:

1. Because these Offences are justifiable, being but the bringing the Speaker to the Chair, which also perhaps was done by the Votes of the Commons; but if these matters shall be justified in this court, no trial can be, for upon issue of his own wrong, he cannot be tried, because acts done in the house of commons are of record, as it was resolved in the parliament, 1 Jac. and 16 H. 7, 3. C. 9. 3. are that such matters cannot be tried by the country. And now they cannot be tried by record, because, as 22 H. 8, Dy. 32. is, an inferior court cannot write to a superior. And no Certiorari lies out of the Chancery, to send this here by Mittimus, for there was never any precedent thereof; and the book of the house of commons, which is with their clerk, ought not to be divulged. And *C. Little.* is, that if a man be indicted in this court for piracy committed upon the sea, he may well plead to the jurisdiction of this court, because this court cannot try it.

2. It appears by the old Treatise, 'De modo 'tenendi Parliamentum,' that the Judges are but assistants in the parliament; and if any words or acts are made there, they have no power to contradict or controul them. That it is incongruous that they, after the parliament dissolved, shall have power to punish such words or acts, which at the time of the speaking or doing, they had not power to contradict. There are superior, middle, and more inferior magistrates; and the superior shall not be subject to the controul of the inferior. It is a position, that 'in pares est nullum imperium, 'multo minus in eos, qui magis imperium habent.' *C. Littl.* says, That the parliament is the supreme tribunal of the kingdom, and they are Judges of the supreme tribunal; therefore they ought not to be questioned by their inferiors. (3). The Offences objected do concern the privileges of parliament, which privileges are determinable in parliament, and not elsewhere, as appears by the precedents which have been cited before. (4.) The Common Law hath assigned proper courts for matters, in respect of the place and persons: 1. For the place, it appears by 11 Ed. 4, 3, and old Entries, 101, that in an *ejectione firmæ*, it is a good plea, that the land is ancient demesne, and this excludes all other courts. So it is for land in Durham, old Entries, 419, for it is questionable there, and not out of the County. 2. For persons, H. 15 H. 7, rol. 93, old Entries, C. If a clerk of the Chancery be impleaded in

the court, he may plead his privilege, and shall not answer. So it is of a Clerk of the Exchequer, old Entries, 473, then much more when offences are done in parliament, which is exempt in ordinary jurisdiction, they shall not be drawn into question in this court. And if a man be indicted in this court, he may plead sanctuary, 22 H. 7, Keilw. 91. & 22, and shall be restored, 21 E. 3, 60. The Abbot of Bury's Case is to the same purpose. (5.) For any thing that appears, the house of commons had approved of these matters, therefore they ought not to be questioned in this court. And if they be offences, and the said house hath not punished them, this will be a casting of imputation upon them. (6.) It appears by the old Entries, 446, 447. that such an one ought to represent the borough of St. Germains, from whence he was sent; therefore he is in nature of an ambassador, he shall not be questioned for any thing in the execution of his office, if he do nothing against the Law of Nature or Nations, as it is the case of an ambassador. In the time of queen Elizabeth, (Camden's Brit. 449.) the bishop of Ross, in Scotland, being ambassador here, attempted divers matters against the State; and by the opinion of all the civilians of the said time, he may be questioned for those offences, because they are against the law of nations and nature; and in such matters, he shall not enjoy the privileges of an ambassador. But if he commit a civil offence, which is against the municipal law only, he cannot be questioned for it, as Bodin. de Republica, agrees the case. Upon the Statute of 28 H. 8, c. 15, for Trial of Pirates, 13 Jac. the case fell out to be thus: A Jew came ambassador to the United Provinces, and in his journey he took some Spanish ships, and after was driven upon this coast; and agreed upon the said statute, that he cannot be tried as a pirate here by commission, but he may be questioned *civiliter* in the admiralty; for, 'legati suo regi soli judicium faciunt.' So ambassadors of parliament, *soli parliamento*, to wit, in such things, which of themselves are punishable. (7.) There was never any precedent, that this court had punished offences of this nature, committed in parliament, where any plea was put in, as here it is to the jurisdiction of the court; and where there is no precedent, non-usage is a good expositor of the law. Lord *Littl. Section* 180. *Co. Littl.* 181, says, as usage is a good interpreter of the laws, so non-usage, where there is no example, is a great intendment that the law will not bear it. 6 Eliz. Dy. 229, upon the Statute of 27 H. 8, of inrollments, that bargain and sale of a house in London ought not to be enrolled; the reason there given is, because it is not used. 13 Eliz. Dy. 376, no error lies here of a Judgment given in the five ports, because such writ was never seen; yet in the diversity of Courts it is said, that error lies of a Judgment given in the five ports. 39 H. 6, 39, by Ashton, that a protection to go to Rome was never seen, therefore he disallowed it. (8.) If this Court shall have jurisdiction, the court may give judgment according to law, and yet contrary to parliament law, for the parliament in divers cases hath a peculiar law. Notwithstanding the Statute of 1 H. 5, c. 1. That every burgess ought to be resident within the borough of which he is burgess, yet the constant usage of parliament is contrary thereunto; and if such matter shall be in question before ye, ye ought to adjudge according to the statute, and not according to their usage. So the house of Lords hath a special law also, as appear by 11 R. 2, the Roll of the process and judgment (which hath been cited before to another purpose) where an appeal was not according to the one law or the other, yet it was good according to the course of parliament. (9.) Because this matter is brought in this court by way of Information, where it ought to be by way of Indictment. And it appears by 41 Ass. p. 12, that if a bill of Deceit be brought in this court, where it ought to be by writ, this matter may be pleaded to the jurisdiction of the court, because it is *vi et armis*, and *contra pacem*. It appears by all our Books, that informations ought not to be grounded upon surmises, but upon matter of record, 4 H. 7, 5. 6 E. 6, Dy. 74. Information in the Exchequer, and 11 H. 8, Keilw. 101, are to this purpose. And if the matter be *vi et armis*, then it ought to be found by inquest. 2 E. 3, 1, 2. Appeal shall not be granted upon the return of the sheriff, but the king ought to be certified of it by indictment. 1 H. 7, 6, and Stamf. f. 95, a. upon the statute of 25 E. 3, c. 4, that none shall be imprisoned but upon indictment or presentment; and 28 E. 3, c. 3, 42 E. 3, c. 3, are to the same purpose. So here, this information ought to have been grounded upon indictment, or other matter of record, and not upon bare intelligence given to the king. (10.) The present case is great and difficult, and in such cases, the Judges have always outed themselves of jurisdiction, as appears by Bracton, Book 2, f. 1, 'Si aliquid novi non usitatum in regno accidit,' 2 E. 3, 6, 7, and Dower 242.

Now I will remove some Objections which may be made.

Where the king is Plaintiff, it is in his election to bring his action in what Court he pleases. This is true in some sense, to wit, That the King is not restrained by the Statute of Magna Charta, 'Quod communia placita non sequan-'tur curiam nostram;' for he may bring his *quare impedit* in B. R. And if it concerns Durham, or other County Palatine, yet the king may have his action here: for the said Courts are created by patent, and the king may not be restrained by parliament, or by his own patent, to bring his action where he pleaseth. But the king shall not have his action where he pleaseth against a prohibition of the common law, as 12 H. 7, Keilw. 6, the king shall not have a *formedon* in Chancery. And C. 6. 20 Gregory's Case, if the king will bring an information in an inferior court, the party may plead to the jurisdiction. So where

the Common Law makes a prohibition, the king hath not election of his court.

The information is *contra formam statuti*, which Statute, as I conceive, is intended the statute of 5 H. 4, c. 6, and 11 H. 6, c. 11, which gives power to this court to punish an assault made upon the servant of a knight of Parliament. But our case is not within those statutes, nor the intent of them; for it is not intendible, that the parliament should disadvantage themselves in point of their privilege. And this was a Trespass done within the house, by parliament-men amongst themselves. And Crompton's Jurisdiction of Courts, f. 8, saith, That the parliament may punish trespasses done there.

Precedents have been cited of Parliament-men imprisoned and punished for matters done in parliament. To this I say, That there is *via juris*, and *via facti*; and *via facti* is not always *via juris*. C. 4, 93, Precedents are no good directions, unless they be judicial.

Otherwise there will be a failure of justice, wrongs shall be unpunished. To this I answer, That a mischief is oft-times rather sufferable than an inconvenience, to draw in question the privileges of parliament. By the antient Common Law, as it appears by 21 E. 3, 23, and 21 Ass. if an infant bring an Appeal, the suit shall be staid during his infancy; because the party cannot have his trial by battle against the infant; but the law is now held otherwise in the said case. And in some cases, criminal offences shall be dispunished, 29 H. 8, Dy. 40. Appeal of Murder lies not for Murder done in several Counties.

This court of B. R. is *coram ipso rege*; the king himself, by intendment, is here in person. And, as it is said, C. 9, 118, it is, 'Supremum 'Regni Tribunal,' of ordinary jurisdiction. But to this I say, That the Parliament is a transcendent court, and of transcendent jurisdiction: it appears by 28 Ass. p. 52, that the stile of other courts is *coram rege*, as well as this is; as 'coram rege in cancellaria, coram rege in 'camera;' and though it be *coram rege*, yet the Judges give the judgment. And in the time of H. 3, in this court, some entries were 'coram rege,' others, 'coram Hugone de Bigod.'

The Privileges of Parliament are not questioned, but the conspiracies and misdemeanors of some of them. But to this I say, that the distinction is difficult and narrow in this case, where the offences objected are justifiable, and if they be offences, this reflects upon the house, which hath not punished them.

The Cases of 3 E. 3, 19, and 1 and 2 Phil. et Mar. have been objected. But for the last it is observable, That no plea was pleaded to the jurisdiction, as it is in our case. And if a parliament-man, or other which hath privilege, be impleaded in foreign court, and neglect his plea to the jurisdiction, the court may well proceed, 9 H. 7, 14, 36 H. 6, 34 H. 13 Jac. In this Court the lord Norreys, that was a peer of parliament, was indicted for the murder of one Bigod, and pleaded his pardon. And there it was doubted, how the Court should proceed against him (for he, by law, ought to have his trial by his peers). And it was resolved, that when he pleads his pardon, or confesseth the fault, thereby he gives jurisdiction to the court, and the court may give judgment against him. So that these cases, where it was not pleaded to the jurisdiction, can be no precedent in our case.

The privilege here is not claimed by Prescription or Charter, therefore it is not good. But I say, that notwithstanding this, it is good; for where the Common Law outs a court of jurisdiction, there needs no Charter or Prescription; 10 H. 6, 13, 8 H. 8, Keilw. 111. Br. n. c. 515. Where sanctuary of a Clerk is pleaded, there is no need to make prescription, because every Church is a sanctuary by the common law. Therefore, &c.

Sir *Robert Heath*, the King's Attorney, the same day argued on the other side, but briefly. First, he answered the Objections which had been made.

1. He said, That informations might well be for matters of this nature, which are not capital; and that there are many precedents of such informations. (But Note, that he produced none of them.)

2. It hath been objected, That they were council, therefore they ought to speak freely. But such speeches which are here pronounced prove them not counsellors of state, but traitors; the addition of one word would have made it treason, to wit, *proditorie*. But it is the pleasure of the king to proceed in this manner, as now it is. And there is great difference between Bills and Libels, and between the proceedings, as council and as mutinous.

3. That it would be of dangerous consequence; for by this means none would adventure to complain of grievances. I answer, they may make their complaints in a parliamentary manner; but they may not move things, which tend to distraction of the king and his government.

4. These matters may be punished in following parliaments. But this is impossible, for following parliaments cannot know with what mind these matters were done. Also the House of Commons is not a court of justice of itself. The two houses are but one body, and they cannot proceed criminally to punish crimes, but only their members by way of imprisonment; and also they are not a Court of Record. And they have forbid their clerks to make entry of their speeches, but only of matters of course; for many times they speak upon the sudden, as occasion is offered. And there is no necessity that the king should expect a new parliament. The Lords may grant Commissions to determine matters after the parliament ended; but the House of Commons may not do so. And also a new House of Commons consists of new men, which have no cognizance of these offences: 1 H. 4. The bishop of Carlile for words spoken in the parliament, that the king had not right to the crown, was arraign

in this court of High-treason; and then he did not plead his privilege of parliament, but said, That he was *Episcopus unctus*, &c.

4. 4 H. 8. Strode's Case hath been objected. But this is but a particular act, although it be in print; for Rastal entitles it by the name of Strode: so the title, body, and preamble of the act are particular.

6. That this is an inferior court to the parliament, therefore, &c. To this I say, That, even sitting the parliament, this court of B. R. and other courts, may judge of their privileges, as of a parliament-man put in execution, &c. and other cases. It is true that the judges have oft-times declined to give their judgment upon the privileges of parliament, sitting the court. But from this it follows not, that when the offence is committed there, and not punished, and the said court dissolved, that therefore the said matter shall not be questioned in this court.

7. By this means the Privileges of parliament shall be in great danger, if this court may judge of them. But I answer, That there is no danger at all; for this court may judge of acts of parliament.

8. Perhaps these matters were done by the Votes of the house; or, if they be offences, it is an imputation to the house to say, That they had neglected to punish them; but this matter doth not appear. And if the truth were so, these matters might be given in evidence.

9. There is no precedent in the case, which is a great presumption of law. But to this I answer, That there was never any precedent of such a fact, therefore there cannot be a precedent of such a judgment. And yet in the time of queen Elizabeth, it was resolved by Brown, and many other justices, that offences done in parliament may be punished out of parliament, by imprisonment or otherwise. And the case of 3 E. 3, 19, is taken for good law by Staml. and Fitzh. And 22 E. 3, and 1 Mar. accord directly with it. But it hath been objected, that there was no plea made to the jurisdiction. But it is to be observed, that Plowden, that was a learned man, was one of the defendants, and he pleaded not to the jurisdiction, but pleaded licence to depart. And the said information depended during all the reign of queen Mary, during which time there were four parliaments, and they never questioned this matter.—But it hath been further objected, That the said case differs from our case, because that there the offence was done out of the house, and this was done within the house. But in the said case, if licence to depart be pleaded, it ought to be tried in parliament, as well as these offences here. Therefore, &c.

The Judges also the same day spake briefly to the case, and agreed with one voice, 'That 'the court, as this case is, shall have jurisdic-'tion, although that these offences were com-'mitted in parliament, and that the imprisoned 'members ought to answer.'

Jones began and said, That though this question be now newly moved, yet it is an ancient question with him; for it had been in his thoughts these 18 years. For this information, there are three questions in it: 1. Whether the matters informed be true or false? And this ought to be determined by Jury or Demurrer. 2. When the matters of the information are found or confessed to be true, if the information be good in substance? 3. Admit that the offences are truly charged, if this Court hath power to punish them? And that is the sole question of this day.—And it seems to me, that of these offences, although committed in parliament, this court shall have jurisdiction to punish them. The plea of the Defendants here to the jurisdiction being concluded with a demurrer, is not peremptory unto them, although it be adjudged against them; but if the plea be pleaded to the jurisdiction, which is found against the Defendant by verdict, this is peremptory.

In the discussion of this point, I declined these questions: 1. If the matter be voted in parliament, when it is finished, it can be punished and examined in another court? 2. If the matter be commenced in parliament, and that ended, if afterward it may be questioned in another court?

I question not these matters; but I hold, that an offence committed criminally in parliament, may be questioned elsewhere, as in this court; and that for these Reasons:

1. 'Quia interest reipublicæ ut maleficia 'non maneant impunita:' and there ought to be a fresh punishment of them. Parliaments are called at the king's pleasure, and the king is not compellable to call his parliament; and if before the next parliament, the party offending, or the witnesses die, then there will be a failure of justice.

2. The parliament is no constant court; every parliament mostly consists of several men, and, by consequence, they cannot take notice of matters done in the foregoing parliament; and there they do not examine by oath, unless it be in Chancery, as it is used of late time.

3. The parliament cannot send process to make the offenders to appear at the next parliament; and being at large, if they hear a noise of a parliament, they will *fugam facere*, and so prevent their punishment.

4. Put the case, that one of the Defendants be made a baron of parliament, now he cannot be punished in the house of commons, and so he shall be unpunished.

It hath been objected, 'That the parliament 'is the superior court to this, therefore this 'court cannot examine their proceedings.'

To this I say, That this Court of the King's-Bench is a higher court than the Justices of Oyer and Terminer, or the Justices of Assize: but if an offence be done where the King's-Bench is, after it is removed, this offence may be examined by the Justices of Oyer and Terminer, or by the Justices of Assize. We can-

not question the judgments of parliaments, but their particular offences.

2 Object. It is a privilege of parliament, whereof we are not competent judges.

To this I say, That 'privilegium est privata 'lex et privat. legem.' And this ought to be by grant or prescription in parliament: and then it ought to be pleaded for the manner, as is in 33 H. 1, Dy. as it is not here pleaded. Also we are Judges of all acts of parliament: as 4 H. 7, ordinance made by the king and commons is not good, and we are judges what shall be a session of parliament, as it is in Plowden, in Partridge's Case. We are Judges of their lives and lands, therefore of their liberties. And 3 Eliz. which was cited by Mr. Attorney, it was the opinion of Dyer, Catlyn, Welsh, Brown, and Southcot, justices, That offences committed in parliament may be punished out of parliament. And 3 Ed. 5, 19, it is good law. And it is usual near the end of parliaments, to set down some petty punishment upon offenders in parliament, to prevent other courts. And I have seen a Roll in this Court, in 6 H. 6, where Judgment was given in a Writ of Annuity in Ireland, and afterward the said judgment was reversed in parliament in Ireland; upon which judgment, Writ of Error was brought in this Court, and reversed.

Hyde, Chief-Justice, to the same intent: No new matter hath been offered to us now by them that argue for the Defendants, but the same reasons and authorities in substance, which were objected before all the justices of England, and barons of the Exchequer, at Serjeants-inn in Fleet-street, upon an Information in the Star Chamber for the same matter. At which time, after great deliberation, it was resolved by all of them, 'That no offence com-'mitted in parliament, that being ended, may 'be punished out of parliament.' And no court more apt for that purpose than this court in which we are: and it cannot be punished in a future parliament, because it cannot take notice of matters done in a foregoing parliament.

As to what was said, That an inferior court cannot meddle with matters done in a superior; true it is, that an inferior court cannot meddle with judgments of a superior court; but if particular members of a superior court offend, they are oft-times punishable in an inferior court, as, if a judge shall commit a capital offence in this court he may be arraigned thereof at Newgate, 3 E. 3, 19. and 1 Mar. which have been cited, over-rule this case. Therefore, &c.

Justice *Whitlocke*. 1. I say in this case, 'Nihil dictum quod non dictum prius.' 2 That all the Judges of England have resolved this very point. 3. That now we are but upon the brink and skirts of the cause: for it is not now in question, if these be offences or no; or, if true or false; but only if this court have jurisdiction.

But it hath been objected, That the offence is not capital, therefore it is not examinable in this court.

But though it be not capital, yet it is criminal, for it is sowing of sedition to the destruction of the commonwealth. The question now is not between us that are Judges of this Court and the parliament, or between the king and the parliament, but between some private members of the house of commons and the king himself: for here the king himself questions them for those offences, as well he may. In every commonwealth there is one supereminent power, which is not subject to be questioned by any other, and that is the king in the commonwealth, who, as Bracton saith, 'Solus 'Deum habet ultorem.' But no other within the realm hath this privilege. It is true, that that which is done in parliament by consent of all the house, shall not be questioned elsewhere: but if any private members 'exerce 'personas judicem, et induunt malefacientium 'personas, et sunt seditiosi;' is there such sanctimony in the place, that they may not be questioned for it elsewhere? The bishop of Ross, as the case hath been put, being ambassador here, practised matters against the state, and it was resolved, That although 'legatus 'sit rex in alieno solo,' yet when he goes out of the bounds of his office, and complots with traitors in this kingdom, that he shall be punished as an offender here. A minister hath a great privilege when he is in the pulpit; but yet, if in the pulpit he utter speeches, which are scandalous to the state, he is punishable. So in this case, when a burgess of parliament becomes mutinous, he shall not have the privilege of parliament. In my opinion, the realm cannot consist without parliaments, but the behaviour of parliament-men ought to be parliamentary. No outrageous speeches were ever used against a great minister of state in parliament which have not been punished. If a judge of this court utter scandalous speeches to the state, he may be questioned for them before commissioners of Oyer and Terminer, because this is no judicial act of the court.

But it hath been objected, That we cannot examine acts done by a higher power.

To this I put this case: when a peer of the realm is arraigned of Treason, we are not the judges, but the High-Steward, and he shall be tried by his peers: but if error be committed in this proceeding, that shall be reversed by error in this court: for that which we do is *coram ipso rege*.

It hath been objected, 'That the Parlia-'ment-law differs from the law by which we 'judge in this court in sundry cases.' And for the instance which hath been made, 'That by 'the statute, none ought to be chosen burgess 'of a town in which he doth not inhabit, but 'that the usage of parliament is contrary;' but if information be brought upon the said statute against such a burgess, I think that the usage is a good warrant for us to give judgment against him.

And it hath been objected, 'That there is 'no Precedent in this matter.'

But there are sundry Precedents, by which it appears, that the parliament hath transmitted matters to this court; as 2 R. 2, there being a question between a great peer and a bishop, it was transmitted to this court, being for matter of behaviour: and although the Judges of this court are but inferior men, yet the court is higher. For it appears by 11 Eliz. Dy. That the Earl Marshal of England is an officer of this court; and it is always admitted in parliament, That the Privileges of Parliament hold not in three cases, to wit, 1. In case of Treason. 2. In case of Felony. And 3. in suit for the Peace. And the last is our very case. Therefore, &c.

Croke argued to the same intent: he said, That these offences ought to be punished in the court, or no where; and all manner of offences which are against the crown are examinable in this court. It hath been objected, 'That by 'this means, none will adventure to make com-'plaints in parliament.' That is not so; for he may complain in a parliamentary course, but not falsely and unlawfully, as here is pretended: for that which is unlawfully, cannot be in a parliamentary course.

It hath been objected, 'That the parliament 'is a higher court than this.' And it is true: but every member is not a Court; and if he commit offence he is punishable here. Our court is a court of high jurisdiction, it cannot take cognizance of real pleas; but if a real plea comes by error in this court, it shall never be transmitted. But this court may award a Grand Cape, and other process usual in real actions: but of all capital and criminal causes, we are originally competent judges, and by consequence of this matter. But I am not of the opinion of Mr. Attorney-General, that the word *proditorie* would have made this treason. And for the other matters, he agreed with the judges. Therefore by the court, the defendants were ruled to plead further: and Mr. Lenthal of Lincoln's-Inn was assigned of counsel for them.

But inasmuch as the Defendants would not put in any other Plea, the last day of the Term judgment was given against them upon a *nihil dicit*; which Judgment was pronounced by Jones to this effect:

"The matter of the Information now, by the confession of the Defendants, is admitted to be true, and we think their plea to the jurisdiction insufficient for the matter and manner of it. And we hereby will not draw the true Liberties of Parliament-men into question; to wit, for such matters which they do or speak in a parliamentary manner. But in this case there was a conspiracy between the Defendants to disorder the state, and to raise sedition and discord between the king, his peers, and people; and this was not a parliamentary course. All the Judges of England, except one, have resolved the statute of 4 H. 8, to be a private act, and to extend to Strode only. But every member of the parliament shall have such privileges as are there mentioned; but they have no privilege to speak at their pleasure. The parliament is an high court, therefore it ought not to be disorderly, but ought to give good example to other courts. If a Judge of our court should rail upon the state, or clergy, he is punishable for it. A member of the parliament may charge any great officer of the state with any particular offence; but this was a malevolous accusation in the generality of all the officers of state, therefore the matter contained within the information is a great offence, and punishable in this court.

2. "For the Punishment, although the Offence be great, yet that shall be with a light hand, and shall be in this manner.

1. "That every of the Defendants shall be imprisoned during the king's pleasure: Sir John Elliot to be imprisoned in the Tower of London, and the other Defendants in other prisons.

2. "That none of them shall be delivered out of prison until he give security in this court for his good behaviour, and have made submission and acknowledgment of his offence.

3. "Sir John Elliot, inasmuch as we think him the greatest offender, and the ringleader, shall pay to the king a Fine of 2,000*l.* and Mr. Hollis, a Fine of 1,000 marks: and Mr. Valentine, because he is of less ability than the rest, shall pay a Fine of 500*l.*" And to all this, all the other Justices with one voice accorded.

Afterwards the Parliament which met the 3d of November, 1640, upon report made by Mr. Recorder Glyn, of the state of the several and respective Cases of Mr. Hollis, Mr. Selden, and the rest of the imprisoned Members of the parliament, in Tertio Caroli, touching their extraordinary sufferings, for their constant affections to the Liberties of the kingdom, expressed in that parliament; and upon Arguments made in the house thereupon, did, upon the 6th of July, 1641, pass these ensuing Votes: which, in respect of the reference they have to these last mentioned proceedings, we have thought fit to insert: viz.

July 6, 1641.

1. "Resolved upon the question, That the issuing out of the Warrants from the lords and others of the privy-council, compelling Mr. Hollis, and the rest of the members of that parliament, 3 Car. during the parliament, to appear before them, is a breach of the privilege of parliament by those privy counsellors.

2. "That the committing of Mr. Hollis and the rest, by the lords and others of the privy-council, during the parliament, is a breach of the Privilege of parliament by those lords, and others.

3. "That the searching and sealing of the chamber, study, and papers of Mr. Hollis, Mr. Selden, and sir John Elbot, being members of this house, and during the parliament, and issuing of Warrants to that purpose, was a breach of the privilege of parliament, by those that executed the same.

4. "That the exhibiting of an Information in

the Court of Star-Chamber, against Mr. Hollis and the rest, for matters done by them in parliament, being members of parliament, and the same so appearing in the Information, is a breach of the privilege of parliament.

5. "That sir Robert Heath, and sir Humphrey Davenport, sir Heneage Finch, Mr. Hudson, and sir Robert Berkley, that subscribed their names to the Information, are guilty thereby of the breach of privilege of parliament.

6. "That there was a delay of justice towards Mr. Hollis, and the rest that appeared upon the Habeas Corpus, in that they were not bailed in Easter and Trinity-term, 5 Car.

7. "That sir Nich. Hyde, then Chief Justice of the King's-bench, is guilty of this delay.

8. "That sir William Jones, being then one of the Justices of the court of King's-bench, is guilty of this delay.

9. "That sir James Whitlocke, knt. then one of the justices of the court of King's-bench, is not guilty of this delay*."

* Mr. Whitlocke in his Memorials of the English Affairs, p. 38, 39, says, "In the house there fell out a Debate touching the Writs of Habeas Corpus, upon which Selden and the rest of his fellow-prisoners demanded to be bailed; and the Judges of the King's-bench did not bail them, as by law they ought; but required of them sureties for their good behaviour. This was so far aggravated by some, that they moved, 'The prisoners might have reparation 'out of the estates of those Judges who then 'sat in the King's-bench when they were re-'manded to prison;' which Judges they named to be Hyde, Jones, and my father: as for judge Croke, who was one of that court, they excused him, as differing in opinion from the rest.—I being a member of the house, and son to the Judge, knew this to be mistaken, as to the fact, and spake in the behalf of my father, to this effect: 'That it was not unknown to 'divers worthy members of the house, that 'judge Whitlocke had been a faithful, able, and 'stout assertor of the Rights and Liberties of 'the free-born subjects of this kingdom; for 'which he had been many ways a sufferer. And 'particularly by a strait and close imprisonment, 'for what he said and did, as a member of this 'honourable house in a former parliament: and 'he appeals to those noble gentlemen, who can-'not but remember those passages; and some 'who were then sufferers with him. And for 'his Opinion, and carriage in the Case of the 'Habeas Corpus, it is affirmed to have been 'the same with that of Judge Croke; and 'he appeals for this, to the honourable gentle-'men who were concerned in it; and others, 'who were present then in court.' Hampden, and divers others, seconded this motion; who affirmed very much of the matter of fact, and expressed themselves with great respect and honour to the memory of the deceased Judge, who was thereupon reckoned by the house in the same degree with Judge Croke, as to their censure and proceedings."

Ordered, That the further debate of this shall be taken into consideration on to-morrow morning.

July 8, 1641.

10. "Resolved upon the question, That sir George Croke, knight, then one of the Judges of the King's-bench, is not guilty of this delay.

11. "That the continuance of Mr. Hollis, and the rest of the Members of Parliament, 3 Car. in prison, by the then Judges of the King's-bench, for not putting in sureties for their good behaviour, was without just or legal cause.

12. "That the exhibiting of the informations against Mr. Hollis, sir John Elliot, and Mr. Valentine, in the King's-bench, being Members of Parliament, for matters done in parliament, was a breach of the privilege of parliament.

13. "That the over-ruling of the Plea, pleaded by Mr. Hollis, sir John Elliot, and Mr. Valentine, upon the information, to the jurisdiction of the court, was against the law and privilege of parliament.

14. "That the judgment given upon a *nihil dicit*, against Mr. Hollis, sir John Elliot, and Mr. Valentine, and fine thereupon imposed, and their several Imprisonments thereupon, was against the law and privilege of parliament.

15. "That the several proceedings against Mr. Hollis, and the rest, by committing them, and prosecuting them in the Star-Chamber, and in the King's-Bench, is a Grievance.

16. "That Mr. Hollis, Mr. Stroud, Mr. Valentine, and Mr. Long, and the heirs and executors of sir John Elliot, sir Miles Hobart, and sir Peter Heyman, respectively, ought to have reparation for their respective damages and sufferings, against the lords and others of the council, by whose warrants they were apprehended and committed, and against the council that put their hands to the information in the Star-Chamber, and against the Judges of the King's-Bench.

17. "That Mr. Lawrence Whitaker, being a member of the parliament 3 Car. entering into the chamber of sir John Elliot, being likewise a member of the parliament, searching of his trunks and papers, and sealing of them, is guilty of the breach of the privilege of parliament, this being done before the dissolution of parliament.

18. "That Mr. Lawrence Whitaker being guilty of the breach of the privileges as aforesaid, shall be sent forthwith to the Tower, there to remain a prisoner during the pleasure of the house."

Mr. Whitaker was called down, and kneeling at the bar, Mr. Speaker pronounced the Sentence against him accordingly.

Mr. Whitaker being at the bar, did not deny, but that he did search and seal up the chamber, and trunk, and study of sir John Elliot, between the 2d and 10th of March, during which time the parliament was adjourned, but endeavoured to extenuate it, by the confusion of the times, at that time; the length of the time since that crime was committed, being

seven years; the command that lay upon him, being commanded by the king and 23 privy-counsellors.

Afterwards Mr. Recorder Glyn made a further Report to the House of Commons, viz.

The Warrant, which issued and was subscribed by twelve privy-counsellors, to summon one of the members of the house of commons, to the Parliament of *tertio Caroli*, to appear before them during the parliament, viz. Mr. Wm. Stroud, Mr. Benj. Valentine, Mr. Hollis, sir John Elliot, Mr. Selden, sir Miles Hobart, sir Peter Heyman, Mr. Walter Long, and Mr. Wm. Coriton, bearing date *tertio Martii, quarto Caroli*; and the names of the twelve privy-counsellors that signed this warrant, were read: the parliament being adjourned the 2d of March, to the 10th of March, and then dissolved.

The Warrants under the hands of sixteen privy-counsellors, for committing of Mr. Denzil Hollis, sir John Elliot, Mr. John Selden, Mr. Benj. Valentine, and Mr. Wm. Coriton, close prisoners to the Tower, bearing date, *quarto Martii, quarto Caroli*, during the parliament; were read; and the names of the privy-counsellors that subscribed them, were read. The Warrants under the hands of 22 privy-counsellors, directed to Wm. Boswel, esq. to repair to the lodgings of Denzil Hollis, esq. and to Simon Digby, esq. to repair to the lodgings of Mr. John Selden, and to Lawrence Whitaker, esq. to repair to the lodgings of sir John Elliot, requiring them to seal up the trunks, studies, and cubinets, or any other thing that had any papers in them, of the said Mr. Hollis, Mr. John Selden, and sir John Elliot, were read, and likewise the names of the privy-counsellors that subscribed the said Warrants. A Warrant under the hands of 13 privy-counsellors, for the commitment of Mr. Wm. Stroud close prisoner to the King's-Bench, bearing date 2d April, 1628, was read, and the names of the privy-counsellors that subscribed it: The like Warrant was for the commitment of Mr. Walter Long, close prisoner to the Marshalsea.

Resolved, &c. 1. "That Mr. Hollis shall have the sum of 5,000*l.* for his damages, losses, imprisonments, and sufferings, sustained and undergone by him, for his service done to the commonwealth in the parliament of *tertio Caroli*.

2. "That Mr. John Selden shall have the sum of 5,000*l.* for his damages, losses, imprisonments, and sufferings, sustained and undergone by him, for his service done to the commonwealth in the parliament of *tertio Caroli*.

3. "That the sum of 5,000*l.* be assigned for the damages, losses, imprisonments, and sufferings, sustained and undergone by sir John Elliot, for his service done to the commonwealth in the parliament of *tertio Caroli*, to be disposed of in such manner as this house shall appoint.

4. "That the sum of 2,000*l.* part of 4,000*l.* paid into the late court of Wards and Liveries, by the [illegible], being commanded by the king and 23 privy-counsellors, shall be repaid to Mr. Elliot, out of the arrears of monies payable into the late court of Wards and Liveries, before the taking away of the said late court.

Ordered, "That it be referred to the committee who brought in this report, to examine the decree made in the late court of Wards and Liveries, concerning the marriage of sir John Elliot's heir with sir Daniel Norton's daughter; and what monies were paid by reason of the said Decree, and by whom; and to report their opinion thereupon to the house. Also, That it be referred to the committee, to examine after what manner sir John Elliot came to his death, his usage in the Tower, and to view the rooms and places where he was imprisoned, and where he died, and to report the same to the house.

Resolved, &c. 5. "That the sum of 5,000*l.* shall be paid unto the ..... of sir Peter Heyman, for the damages, losses, sufferings, and imprisonments, sustained and undergone by sir Peter, for his service done to the commonwealth in the parliament of *tertio Caroli*.

6. "That Mr. Walter Long shall have the sum of 5,000*l.* paid unto him, for the damages, losses, sufferings, and imprisonment, sustained and undergone by him, for his service done to the commonwealth in the parliament *tertio Caroli*.

7. "That the sum of 5,000*l.* shall be assigned for the damages, losses, sufferings, and imprisonment, sustained and undergone by Mr. Stroud (late a member of this house) deceased, for service done by him to the Commonwealth in the parliament of *tertio Caroli*.

8. "That Mr. Benj. Valentine shall have the sum of 5,000*l.* paid unto him, for the damages, losses, sufferings, and imprisonments, sustained and undergone by him, for his service to the Commonwealth in the parliament of *tertio Caroli*.

9. "That the sum of 500*l.* shall be bestowed and disposed of, for the erecting a Monument to sir Miles Hobart, a member of the parliament of *tertio Caroli*, in memory of his sufferings for his service to the Commonwealth in the parliament of *tertio Caroli*."

Ordered, That it be recommitted to the Committee, who brought in this report, to consider how the several sums of money this day ordered to be paid for damages to the several members before named, for their sufferings in the service of the Commonwealth, may be raised.

In the reign of king Charles 2, this Affair was taken into consideration, and the house of commons came to several Resolutions; viz.

Die Martis, 12 Nov. 1667.

Upon a Report made by Mr. Vaughan from the committee concerning Freedom of Speech in parliament.

Resolved, &c. That the house do agree with the committee, That the act of parliament in 4 Hen. 8, commonly intitled, An Act concern-

ing Richard Strode, is a general law, extending to indemnity all and every the members of both houses of parliament, in all parliaments, for and touching any bills, speaking, reasoning, or declaring of any matter or matters, in and concerning the parliament to be communed and treated of, and is a declaratory law of the ancient and necessary rights and privileges of parliament.

Die Sabbati, 23 Nov. 1667.

Resolved, &c. That the Judgment given 5 Car. against sir John Elliot, Denzil Hollis, and Benj. Valentine, in the King's-Bench, is an illegal judgment, and against the freedom and privilege of parliament.

Die Sabbati, 7 Dec. 1667.

Resolved, &c. That the concurrence of the lords be desired to the Votes of this house concerning Freedom of Speech in parliament: and that a Conference be on Monday next desired to be had with the lords, at which time the Votes may be delivered, and reasons for them given.

Die Jovis, 12 Dec. 1667.

A message from the lords by sir William Child and sir Thomas Estcourt. 'Mr. Speaker; The lords have commanded us to acquaint you, that they agree with this house in the Votes delivered them at the last Conference concerning Freedom of Speech in parliament.

Die Mercurii, 11 Dec. 1667.

Next the Lord Chamberlain and the lord Ashley reported the effect of the Conference with the house of commons yesterday, which was managed by Mr. Vaughan, who said he was commanded by the house of commons to acquaint their lordships with some resolves of their house concerning the Freedom of Speech in Parliament, and to desire their lordships concurrence therein.

In order to which, he was to acquaint their lordships with the Reasons that induced the house of commons to pass those resolves. He said the house of commons was accidentally informed of certain Books published under the name of sir George Croke's Reports, in one of which there was a Case published, which did very much concern this great Privilege of Parliament: and which passing from hand to hand amongst the men of the long robe, might come in time to be a received opinion as good law.

The House of Commons considering the consequence, did take care that this Case might be enquired into, and caused the Book to be produced and read in their house, and he thought it the next and clearest way to inform their lordships, is to read the Case itself, which is Quinto Caroli primi Michaelmas term, which Case was read as followeth:

"The King *v.* sir John Elliot, Denzil Hollis, and Benjamin Valentine.

"An Information was exhibited against them by the Attorney-General, reciting, that a parliament was summoned to be held at Westminster, 17 Martii 3 Caroli regis ibidem inchoat. And that sir John Elliot was duly elected and returned knight for the county of Cornwall, and the other two burgesses of parliament for other places: and sir John Finch chosen Speaker. That sir John Elliot, 'machinans et intendens omnibus viis et modis 'seminare et excitare' discord, evil will, murmurings, and seditions, as well 'versus regem, 'magnates, prælatos, proceres et justiciarios, et 'reliquos subjectos regis, et totaliter deprivare 'et subvertere regimen et gubernationem regni 'Angliæ, tam in domino rege quam in concilia'riis et ministris suis cujuscunque generis, et 'introducere tumultum et confusionem' in all estates and parts, 'et ad intentionem,' that all the king's subjects should withdraw their affections from the king, the 23d of Feb. anno 4 Car. in the parliament, and hearing of the commons, 'falso, malitiose, et seditiose,' used these words, 'The king's privy council, his 'judges, and his counsel learned, have con'spired together to trample under their feet the 'Liberties of the Subjects of this realm, and 'the liberties of this house.'

"And afterwards, upon the 2nd of March, anno 4, aforesaid, the king appointed the parliament to be adjourned until the 10th of March next following, and so signified his pleasure to the house of commons; and that the three Defendants the said 2d day of March, 4 Car. *malitiose* agreed, and amongst themselves conspired to disturb and distract the commons, that they should not adjourn themselves according to the king's pleasure before signified; and that the said sir John Elliot, according to the agreement and conspiracy aforesaid, had maliciously 'in propositum et intentionem prædictam' in the house of commons aforesaid, spoken these false, pernicious, and seditious words precedent, &c. And that the said Denzil Hollis, according to the Agreement and Conspiracy aforesaid, between him and the other defendants, then and there 'falso, malitiose, et seditiose uttered hæc falsa, malitiosa et scandalosa 'verba præcedentia, &c.' And that the said Denzil Hollis, and Benjamin Valentine, 'secundum agreamentum et conspirationem prædict. '&c. ad intentionem et propositum prædict.' uttered the said words upon the said 2d day of March, after the signifying the king's pleasure to adjourn; and the said sir John Finch, the Speaker, endeavouring to get out of the Chair, according to the king's command, they 'vi et 'armis manu forti et illicito' assaulted, evil intreated, and forcibly detained him in the Chair; and afterwards being out of the Chair, they assaulted him in the house, and evil entreated him, 'et violenter manu forti et illicito' drew him to the Chair, and thrust him into it. Whereupon there was great tumult and commotion in the house, to the great terror of the Commons there assembled, against their allegiance, in *maximum contemptum*, and to the disherison of the king, his crown and dignity, for which, &c. To this Information the Defendants appearing, pleaded to the jurisdiction of this court, that

the court ought not to have cognizance thereof, because it is for offences done in parliament, and ought to be there examined and punished, and not elsewhere. It was thereupon demurred, and after Argument adjudged, that they ought to answer; for the charge is for conspiracy, seditious acts and practices, to stop the adjournment of the parliament, which may be examined out of parliament, being seditious and unlawful acts; and this court may take cognizance and punish them: Afterwards divers rules being given against them, viz. Sir John Elliot, that he should be committed to the Tower, and should pay 2,000*l.* fine, and upon his enlargement should find sureties for his good behaviour; and against Hollis, that he should pay 1,000 marks, and should be imprisoned, and find sureties, &c. and against Valentine, that he should pay 500*l.* fine, be imprisoned, and find sureties."

Then Mr. *Vaughan* laid much emphasis upon the words 'machinans et intendens, &c.' and then went on, That the house of commons had not only read the Case as it was in the Book, but did look into the Record, where, in the Information itself, they found some considerable differences from the print; as that the crime alledged consisting partly of Words spoken in the house, partly of criminal actions pretended to be committed; the Gentlemen accused pleaded severally, namely, specially to the words, and a several plea apart to the criminal actions: But the court dealt so craftily, that they over-ruled the whole plea, mingled together, and took it in general, so that perhaps whatsoever was criminal in the actions might serve for a justification of their rule, and might make it seem in time to become a Precedent, and a ruled case against the Liberty of Speech in Parliament, which they durst not singly and bare-faced have done.

The House of Commons did take care to enquire what ancient laws did fortify this the greatest Privilege of both houses; and they found in the 4 Hen. 8. an Act concerning one Richard Strode, who was a member of parliament, and was fined at the Stannary Courts, in the West, for condescending and agreeing with other members of the house to pass certain acts to the prejudice of the Stannaries; this act was made occasionally for him, but did reach to every member of parliament that then was, or shall be; the very words being, viz.

'And over that, it be enacted by the same au'thority, that all suits, accusements, condemn'ations, executions, fines, amercements, pu'nishments, corrections, grievances, charges 'and impositions, put or had, or hereafter to be 'put or had unto, or upon the said Richard, 'and to every other person or persons afore'specified, that now be of this present parlia'ment, or that of any parliament hereafter 'shall be, for any bill, speaking, reasoning, or 'declaring of any matter or matters concern'ing the parliament to be commenced and 'treated of, be utterly void, and of none effect. 'And over that, be it enacted by the said au'thority, that if the said Richard Strode, or any 'of the said other person or persons hereafter 'be vexed, troubled, or otherwise charged for 'any causes, as is aforesaid, that then he or 'they, and every of them so vexed or troubled 'of, or for the same, to have action upon the 'case against every such person or persons so 'vexing or troubling any, contrary to this ordi'nance and provision; in the which action the 'party grieved shall recover treble damages and 'costs, and that no protection, essoyne, nor 'wager of law in the said action in any wise be 'admitted nor received.'

He said, it is very possible the Plea of those worthy persons, Denzil Hollis, sir John Elliot, and the rest, was not sufficient to the jurisdiction of the court, if you take in their criminal actions altogether; but, as to the words spoken in parliament, the court could have no jurisdiction while this act of 4 Hen. 8. is in force, which extends to all members that then were (or ever should be,) as well as Strode; and was a public general law, though made upon a private and a particular occasion.

He recommended to their lordships the consideration of the time when these words in the Case of sir George Croke's Reports were spoken, which was the 2nd of March, 4 Caroli primi, being in that parliament which began in the precedent March, 3 Car. at which time the Judgment given in the King's-Bench about the Habeas Corpus was newly reversed, which concerned the freedom of our persons, the liberty of speech invaded in this case; and not long after the same Judges (with some others) joined with them in the Cases of Ship-money, invaded the propriety of our goods and estates; so that their lordships find every part of these words for which those worthy persons were accused, justified.

If any man should speak against any of the great officers, as the Chancellor or Treasurer, or any of the rest recited in those acts, as by accusing them of corruption, ill counsel, or the like, he might possibly justify himself by proving of it; but in this case it was impossible to do it, because those judgments had preceded and concluded him, for he could make none, but by alledging their own judgments which they themselves had resolved, and would not therefore allow to be crimes, which they had made for laws.

He did inform their lordships, that the Bill in the Rolls hath another title than that he did mention; this being that, that the clerks knew it by, rather than the proper title.

The words in the Case are charged *ea intentione*, which ought not to be; for it is clear, and undoubted law, that whatever is in itself lawful, cannot have an unlawful intent annexed to it. Things unlawful may be made a higher crime by the illness of the intent; for instance, taking away my horse is a trespass only, but intending to steal him makes it felony; borrowing my horse, though intending to steal him, is not felony, because borrowing is lawful; and there were no use of freedom of speech otherwise, for a depraved intention may be

annexed to any the most justifiable action. If a man eat no flesh, he may be accused for the depraved intention of bringing in the Pythagorean religion, and subverting the Christian: If a man drink water, he may be accused of the depraved intention of subverting the king's government, by destroying his revenue both of excise and custom.

No man can make a doubt, but whatsoever is once enacted is lawful; but nothing can come into an act of parliament, but it must be first offered or propounded by somebody, so that if the act can wrong nobody, no more can the first propounding; the members must be as free as the houses. An act of parliament cannot disturb the state, therefore the debate that tends to it cannot, for it must be propounded and debated before it can be enacted.

In the reign of Henry 8, when there were so many persons taken by act of parliament out of the lords house, as the Abbots and Priors, and all the religious houses and lands taken away; it had been a strange information against any member of parliament then, for propounding so great an alteration in church and state.

Besides, religion itself began then to be altered, and was perfected in the beginning of queen Edward the 6th's reign, and returned again to Popery in the beginning of queen Mary's; and the Protestant religion restored again in the beginning of queen Elizabeth's.

Should a member of parliament, in any of these times, have been justly informed against in the King's-Bench for propounding or debating any of these alterations; so that their lordships perceive the reasons and inducements the house of commons had to pass these votes now presented to their lordships?

Afterwards these Votes were read, viz.

Resolved, &c. "1. That the act of parliament 4 Hen. 8, commonly intitled, An Act concerning Richard Strode, is a general law, extending to indemnify all and every the members of both houses of parliament, in all parliaments, for and touching any bills, speaking, reasoning, or declaring of any matter or matters in and concerning the parliament, to be communed and treated of; and is a declaratory law of the antient and necessary rights and privileges of parliament. 2. That the Judgment given 5 Car. against sir John Elliot, Denzil Hollis, and Benjamin Valentine, esquires, in the King's-bench, was an illegal Judgment, and against the freedom and privilege of parliament."

To both which Votes the lords agree with the house of commons.

Upon consideration had this day of a Judgment given in the court of King's-Bench in Michaelmas term, in the 5 Charles 1, against sir John Elliot, knt. Denzil Hollis, and Benjamin Valentine, esquires, which Judgment is found to be erroneous: It is ordered by the lords spiritual and temporal in parliament assembled, That the said Denzil Hollis, esq. (now lord Hollis, baron of Ifeild) be desired to cause the Roll of the Court of King's-Bench, wherein the said Judgment is recorded, to be brought before the lords in parliament by a Writ of Error, to the end that such further Judgment may be given upon the said case, as this house shall find meet.

Attorn. Gen. et al. v. Hollis et al.—Mich. 10 Car. secundi regis. Rot. 75.

An Information in the King's-bench against Sir John Elliot.

Memorandum, quod Rob. Heath mil. attorn. dom. regis nunc general. qui pro eodem dom. rege in hac parte sequitur in propr. persona sua ven. hic in cur. dicti dom. regis coram rege apud Westm. die Mercur. prox. post crastin. Animar. isto eodem term. et pro eodem domino rege protulit hic in cur. dicti domin. regis coram ipso rege tunc ibidem quandam informationem versus Johan. Elliot nuper de London mil. Benjamin Valentine nuper de London ar. et Denzil Hollis nuper de London ar. qui sequitur in hec verba scilicet Mild. ss. Memorandum quod Robertus Heath mil. attorn. dom. regis nunc general. qui pro eodem dom. rege in hac parte sequitur in propria persona sua ven. hic in cur. dicti dom. regis coram ipso rege apud Westm. die Mercur. prox. post crastin. Animar. isto eodem termino. Et pro eodem dom. rege dat cur. hic intelligi et informari. Quod cum dictus dom. rex pro diversis arduis et urgentibus negotiis ipsum regem et statum et defension. regn. Angl. et ecclesie Anglican. concernen. quoddam parliament. suum apud civit. suam Westm. pred. tenui ordinavit. Cumque superinde quoddam parliamentum suum debito modo inchoat. et tent. fuit apud Westm. pred. decimo septimo die Martii anno regni dicti dom. regis 3 et ibidem per diversas prorogationes continuat. usque 10 diem Martii anno regni dicti dom. regis 4. qui quidem 10 die Martii idem parliament. dissolut. fuit. Cumque antea pred. 17 diem Martii anno 3 suprad. scilicet 16 die ejusdem mensis Mar. anno 3 suprad. Johannes Elliot nuper de London mil. debito modo elect. et return. fuit in mil. pro com. Cornub. in eodem parliament. deservitur. Cumque etiam Benjamin Valentine nuper de London ar. eodem 16 die Mart. anno 3 suprad. debito modo elect. et returnat. fuit un burgens. pro burgo de St. Germans in pred. com. Cornub. in eodem parliament. deservitur. Cumque etiam Denzil Hollis nuper de London ar eodem 16. die Martii anno 3. suprad. debito modo elect. et returnat. fuit un. burgens. pro burgo de Dorchestr in com. Dors. in eodem parliament deservitur. Cumque etiam Johannes Finch mil. eodem 16 die Martii anno 3 suprad. debito modo elect. et retornat. fuit un. civium pro civitat. Cestr. in eodem parliament. deservitur. Cumque pred. 16 die Martii anno 3 suprad. prefat. J. Finch apud Westm. pred. debito modo electus et constitut. fuit Prolocutor. per commun. in eodem parliament. Et sic Prolocutor pro commun. continuavit usque dissolution. ejusdem parliament. Quod prefat. J. E. machinans et intendens omnibus viis et modis quibus poterit discord. malevolenc. murmuracionis

malitiones tam int. pred. dom. regem et magnat. prælatos, proceres et justic. suos hujus regni quam int. pred. magnat. prælat. proceres et justiciar. dicti dom. regis et reliquos subdit. suos seminare et excitare et regimen et gubernation. hujus regni Angl. tam in pred. dom. rege quam in consiliar. et ministris suis cujuscunque generis totalit. deprivare et enervare et tamult. et confusion. in omnibus statibus et partibus hujus regni Angl. introducere et ad intention. quod veri et ligei subdit. dicti domini regis cordialem suum amorem ab ipso rege retraherent in et duran. parliament. pred. scilicet 23 die Febr. anno 4 suprad. apud Westm. pred. in domo commun. parliament. ibidem et sedente eadem domo militib. civib. et burgens. adtunc et ibidem assemblat. et in eor. presentia et auditu falso et malitiose et seditiose hec falsa ficta malitiosa et scandalosa verba Anglicana alta voce dixit et propalavit, videlicet, 'The King's Privy Council, all his 'judges and his counsel learned, have con-'spired together to trample under their feet 'the liberty of the subjects of this realm, and 'the privileges of this house.' (Privileg. pred. domus commun. parliament. innuendo) cumque potestas summonend. parliament. ejusdemque continuand. adjornand. prorogand. et dissolvend. dom. regi spectat et de jure pertinet ad libitum et beneplacitum suum. cumque dictus dom. rex pro divers. urgent. causis ipsum ad hoc specialit. moven. secundo die Martii anno 4 suprad. parliament. pred. adjornavi ordinavit eodem secundo die Martii usque 10 diem ejusdem mensis Martii adtunc prox. futur. Et dictus dom. rex pred. secundo die Martii anno 4 suprad. apud Westm. pred. mandavit prefat. Johann. Finch adtunc Prolocutori pred. quod ipse eodem secundo die Martii militibus civibus et burgens. in domo commun. parliament. adtunc et ibidem assemblat. beneplacitum dicti dom. regis significaret et notum faceret quod immediate post signification. ill. ne fact. pred. domus commun. per ipsos mil. cives et burgens. adjornaretur usque 10 diem Martii adtunc prox. futur. Et superinde prefat. Johannes Finch eodem secundo die Martii apud Westm. pred. militib. civib. et burgens. in dicta domo commun. parliament. adtunc et ibidem assemblat. sedent. eadem domo publice significavit et notum fecit pred. beneplacitum dicti dom. regis quod pred. domus immediate post signification. ill. fact. usque ad pred. 10 diem Martii per seipsos adjornaretur et quod pred. Johannes Elliot B. Valentine et Denzil Hollis tempore signification. pred. per pred. Prolocutor. in forma pred. fact. presentes fuer. in domo commun. pred. et adtunc et ibidem audiverunt eandem signification. et ill. bene intellexer. pred. tamen J. E. B. V. et D. H. eodem secundo die Martii anno quarto suprad. apud West. pred. malitiose agreaver. et inter eos conspiraver. ad disturband. milites cives et burgens. de pred. domo commun. parliament. in eadem domo apud Westm. pred. adtunc et ibidem assemblat. ne illi secundum beneplacitum dicti dom. regis eis ut prefertur significat. seipsos adjornarentur. Et pred. J. E. secundum agreament. et conspiration. pred. ad malitiosa proposita et intention. pred. postea scilicet eodem secundo die Martii anno 4 suprad. apud Westm. pred. in eadem dom. commun. parliament. in presentia et aud.tu pred. milit. civium et burgens. adtunc et ibidem assemblat. alta voce falso malitiose et seditiose dixit et propalavit hec falsa ficta scandalosa malitiosa et seditiosa Anglicana verba sequen. 'The miserable condi-'tion we are in, both in matters of religion and 'policy, makes me look with a tender eye both 'to the person of the king and the subject: 'you know how Arminianism doth undermine 'us, and how popery comes upon us so open-'faced as it gives a terror to the law; that 'particularly concerning the plantation of 'Jesuits amongst us, and other things incident 'thereto, do manifestly shew it. And not only 'these men who are actors themselves, I mean 'the Jesuits, but those that are their great mas-'ters and fautors, they have the power of the 'law, and dare check magistrates in the exe-'cution of their duties; from them it comes that 'we suffer their guilt, and the fear of punishment 'that may befall them, brings us upon those rocks. 'There are among them some prelates of the 'church, the great bishop of Winchester and his 'fellows; it is apparent what they have done to 'cast an aspersion upon the honour, piety and 'goodness of the king. These are not all: but it 'is extended to some others, who, I fear, in guilt 'and conscience of their own ill deserts, do 'join their power with that bishop, and the 'rest, to draw his majesty into a jealousy of 'the parliament; amongst them I shall not 'fear to name the great Lord Treasurer, in 'whose person is, I fear, contracted all that 'which we suffer. If we look into religion and 'policy, I find him building upon the ground 'laid by the duke of Bucks, his great master; 'from him, I fear, came those ill counsels 'which contracted that unhappy conclusion of 'the last session of parliament. And whoso-'ever shall go about to break parliaments, par-'liaments will break him! I find that not only 'in the affections of his heart, but also in rela-'tion to him, he is the head of the Papists. 'They and their priests and Jesuits have all re-'lation to him, and I doubt not to fix it indu-'bitably upon him; and so far from the great-'ness and power of him comes the danger of 'our religion. For policy in that great ques-'tion of Tonnage and Poundage; that interest 'that is pretended to be the king's, is but the 'interest of that person to undermine the po-'licy of this government, and thereby to weaken 'the kingdom. It was the counsel of Hospi-'tales, chancellor to Charles the Ninth, king 'of France, that the way to weaken this king-'dom was to impeach the trade of it, and so to 'lay our walls waste and open. And I doubt 'not, but by the disquisition of a few days 'to prove that his labours are to undermine 'us; That he invites strangers to come in to 'drive our trade, or at least our merchants to 'trade in strange bottoms, which is as danger-

'ous; and this is that which imprints this fear 'in his person, and makes him to misinterpret 'our proceedings to his majesty. Now there- 'fore it will be fit for true Englishmen to per- 'form their duties, and to shew their desire of 'the safety both of the king and kingdom, and 'to resolve to defend the sincerity of our reli- 'gion, and to declare our resolutions also for 'the defence of the right of the subject, where- 'by we may declare ourselves to be freemen, 'and so the more wealthy and able to supply 'his majesty upon all occasions. And that 'we should declare all that we have suffered 'to be the effect of new counsels, to the ruin 'of the government of this state, and to make 'a protestation against all those men, whether 'greater or subordinate, that they shall all be 'declared as capital enemies to the king and 'kingdom, that will persuade the king to take 'Tonnage and Poundage without grant of par- 'liament. And that if any merchants shall 'willingly pay those duties without consent of 'parliament, they shall be declared as acces- 'saries to the rest.' Quodque pred. D. H. se- cundum agreament. et conspiration. inde inter ipsum et prefat. J. E. & B. V. ut prefertur pre- habit. postea scilicet eodem secundo die Martii anno 4 suprad. apud Westm. pred. in eadem domo commun. parliament. militib. civib. et burgens. adtunc et ibidem assemblat. et in cor. presentia et auditu alta voce falso malitiose et seditiose dixit et propalavit hec falsa ficta ma- litiosa perniciosa et seditiosa verba Anglican. sequen. videlicet, 'Whosoever shall counsel 'the taking up of Tonnage and Poundage with- 'out an act of parliament, let him be account- 'ed a capital enemy to the king and kingdom; 'and what merchant soever shall pay Tonnage 'and Poundage, without an act of parliament, 'let him be accounted a betrayer of the liber- 'ties of the subject, and a capital enemy to 'the king and kingdom.' Quodque prefat. B. V. & D. H. secundum agreament. et conspi- ration. pred. inde inter eos et prefat. J. E. pre- habit. ad intention. et proposit. pred. et ad in- tention. quod. prefat. J. E. & D. H. pred. falsa malitiosa scandalosa et seditiosa verba pred. in forma pred. et ad intention. et propo- sita pred. per eos pred. secundo die Martii anno 4 suprad. dict. et propalat. ut prefertur diceren et propalarent eodem secundo die Martii post signification. pred. pred. benepla- citi dicti dom. regis pro adjornament. dict. domus commun. parliament. ut prefertur. fiend. per prefat. Prolocutorem fact. et ante dictionem et Propalationem aliquor. verbor. pred. prefat. J. E. & D. H. eodem secundo die Martii ut prefertur dict. et propalat. prefat. Johanne Finch Prolocutor. pred. adtunc. et ibidem in quadam cathedra Anglice vocat. 'the 'Speaker's Chair' in domo pred. existen. et ex- tra pred. secundum mandat. dicti dom. regis ei in hac parte prius dat. ire conan. in et super prefat. Johannem Finch adtunc et ibidem in pace Dei et dict. dom. regis existen. vi et armis et manu forti et illicite insult. fecer. et eundem J. Finch maletractaver. et eundem J. F. in cathedra pred. contra voluntat. suam manu forti et illicite detinuer. Quodque postea eodem secundo die Martii et ante diction. pro- palation. aliquor. verbor. pred. per pred. J. E. et D. H. dict. et propalat. secundo die Martii anno 4. suprad. prefat. J. F. Prolocutor. pred. apud Westm. pred. in domo pred. extra cathe- dram pred. adtunc existen. in et super prefat. J. F. adtunc et ibidem in pace Dei et dict. do- mini regis insult. fecer. et prefat. J. Finch ma- letractaver. et violent. manu forti et illicite contra voluntat. suam in cathedram pred. traxer. truser. et impuler. per quod magn. tumult. et periculosa commotio et confusio in dom. commun. pred. et maxima terror. pred. militib. civib. et burgens. adtunc et ibidem assemblat. adtunc et ibidem mot. et excitat. fuer. contra ligeanc. suar. debit. in magn. con- tempt. et manifest. exheredationem dicti do- mini regis et derogation. persone regiminis et prerogative sue regie et in legum et status hu- jus regni Angl. subversion. et in magn. scandal. et ignominiam consiliar. de privato concilio dicti dom. regis et al. magnat. prelator. et procer. hujus regni Angl. et justiciar. et justic. dicti dom. regis ac in disturbation. et terrorem communitat. in parliament. pred. sic ut pre- mittitur assemblat. necnon ad pessimum et per- niciosissimum exemplum omn. al. in hujusmodi casu delinquen. et contra pacem ejusdem dom. regis coron. et dignitat. suas necnon contra formam statut. &c. Unde idem attorn. &c. per quod precept. fuit vic. quod non omitt. &c. Quin venire fac. eos ad respond. &c.

The Defendants plead severally for themselves, that they were Parliament-men, and that the offence was committed in parliament, and ought there to be heard and determined, and not in the King's-Bench.

Et modo scilicet die Martis prox. post octab. Sancti Martini isto eodem termino coram dom. rege apud West. ven. pred. J. E. mil. B. V. & D. H. in propr. person. suis et pred. J. E. habit. audit. information. pred. idem J. quoad supposit. transgr. offens. et contempt. pred. in informatione pred. mentionat. in dicend. et propaland. pred. Anglicana verba in informa- tione pred. superius recitat. Ac eidem J. per informationem pred. in forma pred. imposit. dic. quod ipse non intend. quod dom. rex nunc de aut pro supposit. transgr. offens. et contempt. ill. eidem J. sic imposit. in cur. dicti dom. regis nunc hic responderi velit aut debeat quia dic. quod pred. supposit. offens. transgr. et contempt. in dicend. et propaland. pred. Anglicana verba in informatione pred. men- tionat. et eidem J. in forma pred. imposit in parliament. et non in cur. dom. regis nunc hic audiri et terminari debent, &c. Et ulterius idem Johannes dic. quod ipse pred. 16 die Martii anno 3 suprad. in informatione pred. mentionat. debito modo elect. et retorn. fuit un. mil. pro pred. com. Cornub. in parliament. pred. deservitur. prout in informatione pred. superius mentionat. Quodque idem. J. tempore supposit. offens. transgr. et contempt. pred. in

dicend. et propaland. Anglicana verba pred. eidem J. in forma pred. imposit. ac duran. toto tempore parliament. pred. apud Westm. pred. fuit et remansit un. mil. pro com. Cornub. pred. pro eodem parliament. Et hoc parat. est verificare unde ex quo in informatione pred. evidenter apparet et plene liquet quod supposit. offens. transgr. et contempt. pred. in dicend. et propaland. Anglicana verba pred. eidem J. in forma pred. imposit. et per information. pred. supposit. commiss. fore commiss. fuit in pred. domo commun. parliament. pred. in parlia- ment. pred. idem J. pet. judic. si pred. dom. rex nunc hic de offens. transgr. et contempt. pred. quoad Anglicana verba pred. per ipsum J. in parliament. pred. in forma pred. dici et propalari supposit. in cur. dicti dom. regis nunc hic responderi velit aut debeat. Et quoad tot. resid. supposit. offens. transgr. et contempt. in informatione pre l. mentionat. eidem J. in for- ma pred. imposit. eidem J. dic. quod ipse non intendit quod dictus dom. rex nunc de aut pro pred. resid. offens. transgr. et contempt. pred. in eadem informatione mentionat. eidem J. su- perius in forma pred. imposit. in cur. dicti dom. regis nunc hic responderi velit aut debeat quia dic. quod resid. pred. supposit. offens. transgr. et contempt. in informatione pred. superius spec. eidem Johanni per information. pred. in forma pred. imposit. in parliament. et non in cur. dom. regis nunc hic audiri et terminari de- bent. Et idem J. ulterius dic. quod ipse pred. 16 die Martii anno 3 suprad. in informatione pred. mentionat. debito modo elect. et retornat. fuit un. mil. pro pred. com. Cornub. in pred. parliament. deservitur, prout per information. pred. superius mentionat. Quodque idem J. tempore resid. supposit. offens. transgr. et con- tempt. pred. ei in forma pred. imposit. Ac duran. toto tempore parliament. pred. apud Westm. pred. fuit et remansit un. mil. pro pred. com. Cornub. in parliament. pred. Et hoc parat. est verificare. Unde et ex quo in infor- matione pred. evident. apparet et plene liquet quod pred. resid. pred. supposit. transgr. offens. et contempt. pred. in informatione pred. men- tionat. eidem J. in forma pred. imposit. per eun- dem information. supposit. fore commiss. fuit commiss. in pred. domo commun. parliament. pred. in parliament. pred. idem J. pet. judic. si dictus dom. rex nunc de resid. pred. supposit. offens. transgr. et contempt. in informatione pred. mentionat. eidem J. in forma pred. im- posit. in parliament. pred. in forma pred. fieri supposit. in cur. dom. regis nunc hic responderi velit aut debeat, &c.

Et pred. Benjamin Valentine habit. audit. information. pred. idem B. dic. quod ipse non in- tendit quod dictus dom. rex nunc de aut pro sup- posit. offens. et contempt. pred. in informatione pred. mentionat. eidem B. per eandem informa- tion. imposit. in cur. dicti dom. regis nunc hic re- sponderi velit aut debeat. Quia dic. quod pred. supposit. offens. transgr. et contempt. in inform- atione pred. mentionat. eidem B. per eandem informationem in forma pred. imposit. in par- liament. et non in cur. domini regis nunc hic audiri et terminari debent. Et idem B. ulte- rius dicit quod ipse pred. 16 die Martii anno 3 suprad. in informatione pred. mentionat. debito modo elect. et retorn. fuit un. burgens. pro predicto burgo de St. Germans in pred. com. Cornub. in pred. parliament. deservitur, prout per information. pred. superius men- tionat. Quodq; idem B. tempore supposit. of- fens. transgr. et contempt. pred. ei in forma pred. imposit. Ac duran. toto tempore parliament. pred. apud Westm. pred. fuit et remansit. un. burgens. pro pred. burgo. de St. Germans in eodem parliament. Et hoc parat. est verifica- care. Unde et ex quo in informatione pred. evident. apparet et bene liquet quod supposit. offens. transgr. et contempt. pred. in informa- tione pred. mentionat. eidem B. in forma pred. imposit. per information. pred. supposit. fore commiss. fuit commiss. in pred. domo commun. parliamenti pred. Idem B. pet. judic. si dictus dominus rex nunc de offens. transgr. et con- tempt. pred. sic sibi imposit. per ipsum B. in parliament. predict. fieri supposit. in cur. dicti dom. regis nunc hic responderi velit aut de- beat, &c.

Et pred. Denzil Hollis habit. audit. informa- tion. idem D. quoad supposit. transgr. offens. et contempt. pred. in informatione pred. men- tionat. in dicend. et propaland. pred. Anglicana verba in informatione pred. superius recitat. Ac eidem D. per information. pred. in forma pred. imposit dic. quod ipse non intendit quod dominus rex nunc de aut pro supposit. transgr. offens. et contempt. ill. eidem. D. sic imposit. in cur. dicti domini regis nunc hic responderi velit aut debeat. Quia dic. quod pred. sup- posit. offens. trans. et contempt. in dicend. et propaland. pred. Anglicana verba in informa- tione pred. mentionat. eidem D. in forma pred. imposit. in parliament. et non in cur. dom. regis nunc hic audiri et terminari debeant, &c. Et ulterius idem D. dic. quod ipse pred. 16 die Martii anno 3 suprad. in informatione pred. mentionat. debito modo elect. et retornat. fuit un. burgens. pro pred. burgo de Dorchester in pred. com. Dors. in parliament. pred. deservitur, prout in informatione pred. superius mentionat. Quodque idem D. tempore supposit. offens. transgr. et contempt. pred. in dicend. et pro- paland. Anglicana verba pred. eidem D. in forma pred. imposit. ac duran. toto tempore parliament. pred. apud Westm. pred. fuit et remansit. un. burgens. pro pred. burgo de Dor- chester in eodem parliament. Et hec parat. est verificare. Unde et ex quo in informatione pred. evident. apparet et plene liquet quod sup- posit. offens. transgr. et contempt. pred. in di- cend. et propaland. Anglicana verba pred. eidem D. in forma pred. imposit. per informa- tionem pred. supposit. fore commiss. fuit com- miss. in domo pred. commun. parliament. pred. parliament. pred. idem D. pet. judic. si dictus dom. rex nunc de offens. transgr. et contempt. pred. quoad Anglicana verba pred. per ipsum D. in parliament pred. in forma pred. dici et propalari supposit. in cur. dom. regis nunc hic responderi velit aut debeat. Et quoad tot.

resid. supposit. offens. transgr. et contempt. in informatione pred. mentionat. eidem D. superius in forma pred. imponit. idem D. dicit quod ipse non intendit quod dictus dom. rex nunc de aut pro pred. resid. offens. transgr. et contempt. pred. in eadem informatione mentionat. eidem D. superius in forma predict. imposit. in cur. dicti dom. regis nunc hic responderi velit aut debeat. Quia dic. quod pred. resid. supposit. offens. transgr. et contempt. in informatione pred. superius specificat. eidem D. per information. pred. in forma pred. imponit. in parliament. et non in cur. dom. regis nunc hic audiri et terminari debent. Et idem D. ulterius dic. quod ipse pred. 10 die Martii anno 3 suprad. in informatione pred. mentionat. debito modo elect. et returnat. fuit un. burgens. pro pred. burgo de Dorchester in pred. com. Dors. in pred. parliament. deservitur, prout per information. pred. superius mentionatur. Quodque idem D. tempore resid. supposit. offens. transgr. et contempt. pred. ei in forma pred. imposit. ac duran. toto tempore parliament. pred. apud Westm. pred. fuit et remansit un. burgens. pro pred. burgo de Dorchester in pred. com. Dors. in parliament. pred. Et hoc parat. est verificare. Unde et ex quo in informatione pred. evident. apparet et plene liquet quod pred. resid. supposit. offens. transgr. et contempt. pred. in informatione pred. mentionat. eidem D. in forma pred. imposit. per eandem informationem suppon. fore commiss. in pred. domo commun. parliament. pred. in parliament. pred. idem D. pet. judic. si dictus dom. rex nunc de resid. predict. supposit. offens. transgr. et contempt. in informatione pred. mentionat. eidem D. in forma pred. imposit. in parliament. pred. in forma pred. fieri supposit. in cur. dom. regis hic responderi velit aut debeat, &c.

The Attorney-General demurs to the Pleas severally.

Et prefat. Robertus Heath mil. qui sequitur, &c. quoad pred. placitum pred. J. Elliot pro eodem dom. rege dic. quod placitum ill. prefat. J. in forma pred. superius placitat. materiaque in placito pred. content. minus sufficien. in lege existunt ad precludend. cur. hic a jurisdiction. sua audiend. et terminand. offens. transgr. et contempt. in informatione pred. mentionat. eidem J. per eandem informationem in forma pred. impo-it. Unde pro defectu sufficien. respon. in hac parte pet. judic. Et quod prefat. J. dicto dom. regi in cur. hic respondeat de et in premiss. &c.

Et prefat. R. H. mil. qui sequitur, &c. quoad pred. placitum prefat. B. V. pro eodem domino rege dic. quod placitum ill. prefat. B. in forma pred. superius placitat. materiaque in eodem content. minus sufficien. in lege exist. ad precludend. cur. hic a jurisdiction. sua audiend. et terminand. offens. transgr. et contempt. pred. in informatione pred. mentionat. eidem B. per eandem information. in forma pred. imposit. Unde pro defectu sufficien. respons. in hac parte pet. judic. et quod prefat. B. dicto dom. regi in cur. hic respondeat de et in premiss. &c. Et simile quo ad placitum Denil Hollis.

The Defendants severally join in Demurrer.

Et pred. J. Elliot mil. ut prius dic. quod placitum pred. per ipsum J. superius in forma pred. placitat. materiaque in placito pred. content. bon. et sufficien. in lege existunt ad precludend. cur. hic a jurisdiction. sua audiend. et terminand. offens. transgr. et contempt. pred. in informatione pred. mentionat. eidem Johanni per eandem informationem in forma pred. imposit. Quod quidem placitum materiamque in eodem placito content. idem J. E. mil. parat. est verificare. Unde ex quo idem attorn. dicti dom. regis pro eodem dom. rege ad placitum ill. non respond. nec ill. aliqualit. dedic. sed verification. ill. admittere omnino recusat pet. judic. et quod ipse idem J. de offens. transgr. et contempt. pred. in informatione pred. mentionat. eidem J. per eandem informationem in forma pred. imposit. per cur. hic dimittatur, &c. Et sic de verbo in verbum pro Valentine et Hollis separatim.

The Attorney-General prays that the Defendants may answer.

Et quia cur. dom. regis hic de judic. suo inde reddend. nondum advisatur dies inde dat. est tam prefat. Roberto Heath mil. qui sequitur, &c. quam pred. J. E. B. V. & D. H. in statu quo nunc, &c. usque octab. Sancti Hillar. coram dom. rege ubicunque, &c. de judicio suo inde audiend. eo quod cur. nondum, &c. Ad quas quidem octab. Sancti Hillar. coram dom. rege apud Westm. ven. tam prefat. R. H. qui sequitur, &c. quam pred. J. E. B. V. & D. H. in propr. person. suis. Et prefat. R. H. qui sequitur, &c. pro eodem dom. rege pet. judic.

Judgment that the Pleas to the Jurisdiction of the King's-Bench are insufficient.

Et quod pred. J. E. B. V. D. H. dicto dom. regi in cur. hic respondeant et eor. quilibet respondeat de et in premiss. &c. Super quo visis lectis et audit. omnibus et singulis premiss. pro eo quod videtur cur. hic quod separal. placita pred. per prefat. J. E. B. V. & D. H. in forma pred. superius placitat. materiaque in separal. placitis pred. content. minus sufficien. in lege existunt ad precludend.

The Defendants ordered to answer over.

Cur. hic a jurisdictione sua audiend. et terminand. offens. transgr. et contempt. pred. in informatione pred. mentionat. eisdem J. E. B. V. & D. H. per eandem information. in forma pred. imposit. dictum est eisdem J. E. B. V. & D. H. quod ipsi iidem J. E. B. V. & D. H. dicto dom. regi in cur. hic respondeant & eor. quilibet respondeat de et in premiss. in information pred. superius content. &c. Et super hoc dies dat. est per cur. eisdem J. E. B. V. & D. H. coram dom. rege ubicunque, &c. usque diem Veneris prox. post octab. Pur. beate Marie Virgin. ad information. predict. interloquend. et tunc ad respond. periculis suis.

Judgment against them for want of Pleas in Chief.

Ad quem diem coram dom. rege apud Westm. ven. tam prefat. R. H. qui sequitur, &c. quam prefat. J. E. B. V. & D. H. in propr. personis suis. Et prefat. J. E. B. V. & D. H. licet ipsi eorum premonit. et solempnit. exact. ad respond. nihil dicunt in barr. sive exoneration. information. pred. per quod idem dominus rex remanet versus eos indefense. Ideo cons. est quod pred. J. E. B. V. & D. H. capiantur ad satisfaciend. dom. regi de finib. suis occasione transgr. et contempt. pred. Ac quod habeant imprisonment. corpor. suor. ad voluntat. ipsius dom. regis, et quod antequam deliberentur quilibet eor. inveniat. sufficien. secur. de se bene gerend. erga dictum dominum regem et cunctam populum suum. Et quod pred. J. E. constituatur locumtenen. Turris domini regis London. salvo custodiend. quousque, &c. Quod, &c. pred. B. V. & B. H. committantur Mar. marese. domini regis coram ipso rege salvo custodiend. quousque, &c.

Et finis ejusdem J. E. afferatur per cur. occasione predict. ad 2,000*l.*

Et finis ejusdem B. V. afferatur per cur. occasione pred. ad 500*l.*

Et finis ejusdem D. H. afferatur per cur. ad 1,000 mercas.

Afterwards the Attorney-General comes into Court, and acknowledges that Hollis has paid his Fine.

Postea scilicet die Lune prox. post octab. Pur. beate Marie Virgin. anno regni dom. Caroli nunc regis Angl. &c. 12. coram dom. rege apud West. ven. Johannes Banks mil. attorn. dom. regis nunc general. qui pro eodem dom. rege modo in hac parte sequitur et pro eodem dom. rege dic. et cognovit quod pred. D. H. solvit et satisfecit pred. 1,000 mercas recept. ad Scaccarii dicti dom. regis ad usum dicti dom. regis in plen. satisfaction. pred. finis super ipsum D. pro offens. pred. in informatione pred. superius nominat. per cur. hic in ipsum impost. pront per constat. sub manu Edwardi Wardour mil. clerici pellium recept. Scaccarii dicti dom. regis hic in cur. ostens. plene liquet. Et pro eodem dom. rege idem attorn. dicti dom. regis general. cognovit dictum dom. regem inde fore satisfactum. Ideo idem D. H. de eisdem 1,000 mercis est inde quiet.

At another time after, the Attorney brings into Court the king's Letters Patents under his privy-seal, whereby the king remits to Valentine his Fine, and all the rest of the Judgment; and prays the same may be enrolled and allowed.

Postea scilicet die Mercur. prox. post quindecim Pasche anno regni dicti dom. regis nunc Angl. &c. 16 coram dom. rege apud Westm. ven. Johannes Banks mil. attorn. dom. regis nunc general. in propr. persona sua. Et protulit in cur. dicti dom. regis coram dom. rege nunc ibidem quoddam breve ipsius dom. regis de privat. sigillo sibi et al. direct. et petiit illud irrotulari et allocari, cujus quidem brevis tenor sequitur in hæc verba: 'Charles, by the 'grace of God, king of England, Scotland, 'France, and Ireland, Defender of the Faith, '&c. To the lord high-treasurer of England, 'chancellor, under-treasurer, and barons of 'our Exchequer, and all other officers and ministers of the same court for the time being, 'and to the chief-justice, and the rest of our 'justices of our court of King's-Bench, and to 'our attorney-general, and all other officers 'and ministers of the same court for the time 'being, greeting. Whereas in Michaelmas 'term, in the tenth year of our reign, upon an 'Information in our name exhibited in our 'court of King's-Bench, against Benjamin Valentine, esq.; and others, for divers offences, 'trespasses, and contempts therein mentioned, 'the said Benjamin Valentine, by Judgment of 'the same court, was fined to us in the sum of '500*l.* and to be committed to our prison of 'our Marshalsea during our pleasure; and 'that he shall find sufficient security for his 'good behaviour to us and our people, as by 'the said Information and Judgment there- 'upon remaining upon record in our said court 'of King's-Bench, more at large may appear. 'And whereas the said B. V. hath been restrained of his liberty since the last parliament for not satisfying the said fine so imposed on him, as aforesaid. Now know ye, That 'we of our special grace have remised, released, and quit-claimed, and by these presents, 'for us, our heirs and successors, do remise, release, and quit-claim unto the said B. V. the 'said fine or sum of 500*l.* by the Judgment of 'our said court on him the said B. V. imposed 'as aforesaid. And all commitment, imprison- 'ment, and other matters whatsoever adjudged 'or inflicted upon him by our said court, for or 'by reason of the trespasses, offences or contempts aforesaid. Wherefore we do by these 'presents will and require, as well the lord- 'treasurer, chancellor, under-treasurer, and 'barons of our Exchequer, as the justices of 'our court of King's-Bench, and the officers 'and ministers of the said several courts respectively, to whom it shall or may appertain, 'that they, and every of them respectively, at 'all times hereafter do forbear, and utterly surcease to make or grant forth any extents, 'seizures, executions, or other process whatsoever, against the said B. V. his heirs, executors or administrators, or his or their lands, 'tenements, hereditaments, goods or chattels, 'for or concerning the levying of the said fine 'or sum of 500*l.* or any part thereof. And 'that they take order as well for his full and 'clear discharge thereof, as of and from his 'commitment and imprisonment as aforesaid. 'And these presents, or the enrolment thereof, shall be unto them, and every of them to 'whom it shall or may appertain, a sufficient 'warrant and discharge in that behalf. And 'lastly, we will, and by these presents autho- 'rise and require our attorney-general for the 'time being, for us, and in our behalf, to ac-

'knowledge satisfaction upon record of and for 'the said fine of 500*l.* on the said B. V. by 'Judgment of our said court so imposed as 'aforesaid. Whereby he may be fully and ab-'solutely acquitted and discharged thereof 'against us, our heirs and successors; and 'these presents, or the enrolment thereof, shall 'be unto our said attorney-general for the 'time being, a good and sufficient warrant in 'that behalf. Given under our privy-seal at 'our palace of Westminster, the 7th day of 'March, in the fifteenth year of our reign.'

Judgment of the Court at the Attorney's prayer, that Valentine be discharged.

Et super hoc idem J. B. miles attorn. dicti dom. regis general. pro eodem dom. rege virtute brevis de privat. sigillo predict. dicit et cognovit ipsum dominum regem fore plenar. satisfact. de pred. fin. 500*l.* super ipsum B. V. pro offens. predict. in informatione predict. mentionat. per cur. hic ut prefertur imposit. et pet. quod pred. B. V. virtute brevis pred. de imprisonament. suo ads. ipsius dom. regis et de judic. pred. exoneretur et dimittatur super quo vis. et per cur. hic intellect. omnibus et singulis premiss. cons. est per cur. quod pred. B. V. pro offens. pred. in informatione pred. superius mentionat. per cur. hic ut prefertur imposit. sit inde quiet. et eat inde sine die, et quod ipse idem B. V. de imprisonament. suo ad sect. dom. regis et de judic. pred. versus ipsum B. in forma pred. reddit exoneretur et dimittatur, &c.

D. Hollis, now Lord Hollis, brings a Writ of Error upon the said Judgment, returnable in Parliament.

Postea scilicet 12 die Febr' anno regni dom. nostri Caroli secundi nunc regis Angl. &c. 20 dominus rex mandavit dilecto et fidel. suo Johanni Kelynge mil. capital. justic. dicti dom. regis ad placita coram ipso rege tenend. assign. breve suum clausum in hæc verba, Carolus secundus, &c. dilecto et fidel. nostro Johanni Kelynge mil. capital. justic. nostro ad placita coram nobis tenend. assign. salutem. Quia in record. process. ac etiam in redditione judicii super quandam informationem in cur. dom. Caroli primi nuper regis Angl. patris nostri precharissimi coram ipso nuper dom. rege exhibit. per Robertum Heath mil. tunc attorn. general. ipsius nuper dom. regis, qui pro eodem domino rege in ea parte sequebatur versus Johannem Elliot nuper de London mil. B. Valentine nuper de London pred. ar. et D. Hollis nuper de Lond. pred. ar. de divers. malegestur. ut dicitur error intervenit manifestus de grave dampn. ipsius D. H. modo dom. Hollis baron. de Ifeild sicut ex querela sua accepimus. Nos errorem siquis fuerint modo debito corrigi et eidem D. H. modo domino Hollis baron. de Ifeild plenum et celerem justic. fieri volen. in hac parte vobis mandamus quod si judic. inde reddit. sit tunc record. et process. pred. cum omnibus ea tangen. nobis in present. parliament. nostrum distincte et aperte mittatis et hoc breve ut inspect. record. et process. pred. ulterius inde assensu dominor. spiritual. et temporal. in eodem parliament. existen. pro error. ill. corrigend. quod de jure et secundum legem et cons. regni nostri Angl. fuerit faciend. T. meipso apud Westm. 12 die Febr. anno regni nostri 20. Norbury.

The Lord Chief Justice delivers the Record.

Virtute cujus quidem brevis dictus capital. justic. record. pred. dom. regi in present. parliament. propr. manibus protulit secundum exigenc. ejusdem brevis et postea scilt. 8 die Martii anno regni dom. regis nunc Caroli secund 20 coram ipso rege in presenti parliament. remanent' D. H. modo dom. Hollis baro de Ifeild per Samuel. Astry attorn. suum et dicit quod in record. et process. pred. ac etiam in redditione judicii pred. manifest. est errat. videlicet in hæc verba in informatione pred. mentionat. fore dicti et propalat. in domo commun. parliament. per pred. D. H. modo dominum Hollis tunc existen. burgens. pro burgo de Dorchester in tunc presen. parliament. deservien' audiri et terminari in domo commun. parliament. debeant per legem terre et non in cur. domini regis et in hoc quod per information. in dicto record. mentionat. idem D. H. modo dominus Hollis onaratur cum dictione et propalatione quorundam verbor. in domo commun. parliament. ac etiam cum transgrs. et insult. fact. vi et armis super Johannem Finch Prolocutor. ejusdem tunc domus commun. parliament. Ad que idem D. H. modo dominus H. quo separal. placita placitabat tamen unicum tantum judic. reddit. est de utroque per cur. et unicus finis ubi duo judicia reddi et duo fines imponi debuissent quia e forte transgr. et insult. audiri et terminari forte possit aut debeat in cur. dom. regis coram ipso rege tamen dictio et propalatio verbor. quorumcunque in domo commun. parliament. per burgens. in eodem parliament. deservien. ubicunque in parliament. audiri seu terminari non debent, &c.

Et Galfridus Palmer mil. et bar. attorn. domini regis nunc general. qui per eodem dom. rege in hac parte sequitur presen. in propr. persona sua pro eodem dom. rege dicti quod nec in record. et process. pred. nec in redditione judicii pred. in ullo est errat. et pet. &c.

A Message was sent to the House of Commons by sir William Child and sir Justinian Lewin, to acquaint them, that the Lords do agree to those Votes which were delivered at the Conference yesterday.

Die Mercurii, 15 April, 1668.

"Whereas counsel have been this day heard at the bar, as well to argue the Errors assigned by the lord Hollis, baron of Ifeild, upon a Writ of Error depending in this house, brought against a Judgment given in the court of King's-Bench in 5 Car. 1, against the said lord Hollis, by the name of Denzil Hollis, esq. and others; as also to maintain and defend the said Judgment on his majesty's behalf: Upon due consideration

had of what hath been offered on both parts thereupon, the Lords spiritual and temporal in parliament do order and adjudge, That the said Judgment given in the court of King's-Bench in 5 Car. 1, against the said Denzil Hollis, and others, shall be reversed."

The Form whereof (to be affixed to the Transcript of the Record) followeth:

'Et quia curia parliamenti de judicio suo de 'et super præmissis reddend' nondum advisatur, 'dies datus est tam prædict' Galfrido Palmer 'militi et baronet' qui sequitur, &c. quam præ-'dict' Denzil domino Hollis coram eadem curia 'usque ad diem Mercurii decimum quintum 'diem Aprilis tunc proximum sequentem apud 'Westmonast. in comitat' Middl' de judicio suo 'inde audiend' eo quod curia prædict' nondum, '&c. Ad quem diem coram curia prædict' 'Galfridus Palmer qui sequitur, &c. quam præ-'dictus Denzil dominus Hollis in propriis per-'sonis suis. Super quo, visis, et per eandem 'curiam nunc hic plenius intellectis omnibus et 'singulis præmissis, maturaque deliberatione 'inde habita, consideratum est per curiam præ-'dictam, quod judicium prædict' ob errores 'prædictos et alios in recordo et processu præ-'dictis compertos, revocetur, adnulletur et pe-'nitus pro nullo habeatur. Et quod prædict' 'Denzil dominus Hollis ad omnia quæ idem 'Denzil dominus Hollis occasione judicii præ-'dict. amisit, restituatur.'

Jo. Browne, Cleric. Parliamentorum.

It seems to be but just towards the characters of the Judges of this time to add the following passages from Kennet:

"The urgent necessity of Supplies, to be in some measure suitable to the king's honour, and the very nation's support, must exercise the king's council in finding out all possible ways and means to bring in money. In order to this urgent end, the king sent his letters, dated May 13, 1630, to the Judges and Attorney-General, to frame and publish certain orders for execution of the office of Receiver and Collector of Fines and Forfeitures, erected by his late father of blessed memory, and by his present majesty confirmed to John Chamberlayn his majesty's physician, and Edward Brown, esq. The Judges met and concluded, that the said letters patents were both against law and his majesty's profit, and sent an account of the exceptions and irregularities in the said patent, in a letter from all the Justices and Barons, directed severally to the Lord Keeper and Lord Treasurer. And though this did well demonstrate the integrity of the Judges, that they would never prostitute an opinion to the mere interest of the king; and did as much vindicate his majesty's honour, that he would insist upon no method, though begun by his father, which the Judges of his realm should not pronounce to be strictly lawful; yet, however, this too was applied to the prejudice of the court, as if they were pursuing methods which the very Judges condemned for arbitrary and illegal.

"Westminster-hall was exercised with many singular cases, that serve much to express the disposition of the times. In Easter Term sir Henry Martyn, LL.D. and Judge of the Admiralty, made a great complaint to the king against the Judges of the King's-Bench, for granting prohibitions against his court: and upon this occasion the Judges were called before the king, where they stoutly justified their proceedings in those cases to be according to law, and from whence they could not depart by virtue of their oaths. About the next Term, the feoffees in trust for the buying in of impropriations to be bestowed upon preaching ministers, were brought into the Exchequer for breach of their trust in not augmenting poorer vicarages, but giving arbitrary pensions to lecturers and disaffected preachers: their corporation was dissolved, and their fund and stock adjudged to the king; of which we must take some farther notice in our view of church affairs. Nigh the same time, Huntley, a minister in Kent before mentioned, having been censured and imprisoned by the High Commission Court, brought now his action of false imprisonment against the keeper Mr. Barker, and some of the commissioners by name. The Attorney General moved, that the action might lay against the gaoler only, and by no means against any of the persons in the High Commission: but after long debate, the Court ordered that two of the commissioners should answer. The bishop of London made the king sensible, that the authority of his High Commission Court would fall to nothing, if the Judges of it must be now exposed to personal actions. Upon which the king sent his advocate, Dr. Ryves, to the Lord Chief Justice, requiring him to proceed no farther in that cause till he had spoken with his majesty. The Chief Justice answered, 'We receive the Message;' and then consulted with the Judges, and they came to this resolution, that 'they conceived such a message not to 'stand with their oaths, which commanded an 'indefinite stay of a cause between party and 'party, that might stop the course of justice so 'long as the king would.' And they farther declared the doctor to be no fit messenger, all messages from the king to them being usually by the lord keeper, or the attorney general, in causes relating to the administration of justice. By the court's desire, the chief justice acquainted the lord keeper and the bishop of London, who both agreed that the message was mistaken, and that the king's mind was not to command a stop, but to desire as much slowness as might stand with justice. After this, upon the importunity of the commissioners, who would no longer act if thus exposed to suits at common law; the king assumed the matter to himself, and sending for the Judges, charged them with 'express command, that 'they should not put the commissioners to an-'swer.' The Judges stoutly replied, that they could not, without breach of their oaths, perform that command. Afterwards the matter was handled at the council-table in presence

of the Judges; where, after long hearing, it was determined, that the Judges had done their duty, and that the commissioners ought to answer. Toward the end of Trinity term the sickness encreasing in Southwark, Hobart, Stroud, and Valentine, three of the late members, unprisoned in the Marshalsea, sued to the Judges of the King's-bench to be removed to the Gate-house, and were by writ from the court so removed. But Mr. Selden, being at the same time in the Marshalsea, had forgot or omitted to make the like application to the King's-bench till the term was over, and the Judges in the circuit: After which he sued to the Lord-Treasurer for the like favour of removal, and by warrant from his lordship was accordingly so removed. But in Michaelmas term the Judges called on the marshal for his prisoner Selden; and he producing the treasurer's warrant by the king's direction, they declared such warrant to be illegal, and sent their writ to remand the prisoner back again to the Marshalsea. In the Hilary term following, the attorney-general exhibited two several informations against sir Miles Hobart, kt. and William Stroud, esq.; (who by writ from the King's bench had been removed from the Marshalsea to the Gate-house) for escapes out of prison, proving that Stroud had resided with a keeper in his own chambers at Gray's-Inn; and Hobart had continued with a keeper at his lodgings in Fleet-street. The jury returned their verdicts severally Not Guilty: And the Judges resolved, that the prison of the King's-bench is not any local prison confined to one place; but that every place where any person is by authority of that court restrained of his liberty, is a prison. These several cases, and the decision of them, do abundantly prove, that the present set of Judges were no servile creatures of the court; and that the king did not insist upon their obsequious compliance with him; but they gave their judgments with freedom and courage, and the king acquiesced in their opinion, though contrary to his own."

That the court of King's-bench can come to any prison, see Rex *v.* Hart and White, in dom. proc. May 1809, and the cases and authorities cited in that case.

A

TABLE

Containing THE TITLES of all

THE STATUTES,

PUBLICK and PRIVATE,

From the First Year of King HENRY VIII.

To the Seventh Year of King EDWARD VI.

PUBLICK ACTS.

Anno primo Henrici VIII.

PRIVATE ACTS.

Anno primo Henrici VIII.

PUBLICK ACTS.

Anno tertio Henrici VIII.

PRIVATE ACTS.

Anno tertio Henrici VIII.

PUBLICK ACTS.

Anno quarto Henrici VIII.

PRIVATE ACTS.

Anno quarto Henrici VIII.

PUBLICK ACTS.

Anno quinto Henrici VIII.

PRIVATE ACTS.

Anno quinto Henrici VIII.

Saving of the King's Grants of Liberties.

III. Provided always, That this Act concerning the Forfeiture be not prejudicial nor hurtful to any Person or Persons having Grant of our Sovereign Lord the King, or of any of his noble Progenitors, by his Letters Patents of such Forfeiture, but that they and every of them shall have and enjoy the same according to their former Grants and Liberties.

CAP. VIII.

The Act concerning *Richard Strode*, for Matters reasoned in the Parliament.

'LAMENTABLY complaineth and sheweth unto your most discreet Wisdoms in this present Parliament assembled, *Richard Strode* Gentleman of the County of *Devonshire* One of the Burgesses of this honourable House for the Burgh of *Plimton* in the County aforesaid, that where the said *Richard* condescended and agreed with other of this House, to put forth certain Bills in this present Parliament against certain Persons, named Tinners in the County aforesaid, for the Reformation of the perishing, hurting, and destroying of divers Ports, Havens, and Creeks, and other Bills for the common weal of the said County, the which here in this high Court of Parliament should and ought to be communed and treated of: And for because the said *Richard* is a Tinner, for the Causes and Matters afore rehearsed, one *John Furse* Tinner, Under Steward of the Steinery in the said County, in and at Four Courts of the said Steinery at divers Places and Times before him severally holden in the said County, he and other have condemned the said *Richard* in the Sum of One hundred and threescore Pounds; that is to wit, at every Court Forty Pounds, and by the Procurement of the said *John Furse*, at the said Four several Courts and Lawdays, in the said Steinery, by him holden, in this Manner published and said, that the same *Richard* at the last Parliament holden at *Westminster* would [have] avoided and utterly destroyed all Liberties, Privileges, and Franchises concerning the Steinery: by Reason whereof the said *Richard*, upon Four Bills had and made thereof by the said *John Furse* and other, caused that the said *Richard* was presented and found guilty of the Premises in every of the said Courts in Forty Pounds to be lost and forfeit by him, by Reason of [an] Act and Ordinance by Tinners made and had at a Place in the said County called *Crockerentor*: the Tenor of the which Act appeareth in a Schedule to this Bill annexed: to the which the said *Richard* was never warned nor called to make Answer to the Premises, contrary to all Laws, Right, Reason, and good Conscience: And for the Execution of the same, One *John à Gwilliam* upon a Surmise by him made to the King's Highness to the said Condemnation to be to his Grace forfeit, thereof attained a Bill assigned of Twenty Pounds Parcel of the said Hundred and threescore Pounds, to be to him granted by the said King's Highness: whereupon the said *John à Gwilliam* and other caused the said *Richard* was taken and imprisoned in a Dungeon and a deep Pit under Ground in the Castle of *Lidford* in the said County, and there and elsewhere remained by the Space of Three Weeks and more, unto such Time he was delivered

'livered by a Writ of Privilege out of the King's Exchequer at *Westminster*, for that he was One of the Collectors in the said County for the First of the Two *Quindeims* granted at and in this present Parliament: the which Prison is One of the most anoyous, contagious, and detestable Place within this Realm; so that by Reason of the same Imprisonment he was put in great Peril and Jeopardy of his Life, and the said *Richard* so being in Prison, and the said *John à Gwilliam* seeing the same cruel Imprisonment of the said *Richard*, intreated and instantly desired one *Philip Furse* (then being Keeper of the said Prison) strictly to keep the said *Richard* in Prison, and to put Irons upon him to his more greater Pain and Jeopardy, and to give him but Bread and Water only, to the Intent to cause the said *Richard* to be fain to content and pay him the said Twenty Pounds; and for the same promised the said Keeper Four Marks of Money; for the which Four Marks the said *Richard* for to be eased of his Irons and painful Imprisonment aforesaid (for Safeguard of his Life) promised and granted to pay the said Keeper Four Marks; whereof he paid the said Keeper in Hand Thirteen Shillings Four-pence: And over that the said *Richard* for to be eased of his said painful Imprisonment, was also of Necessity driven to be bounden to *Thomas Denis*, Deputy unto Sir *Henry Marnie* Knight, Warden of the said Steinery, in Obligation of the Sum of an Hundred Pounds. Upon Condition whereof Part is as hereafter followeth: that is to say, that if the above bound *Richard Strode*, defend and save harmless the said *Thomas Denis*, and to use himself as a true Prisoner during the Time it shall please the King to have him Prisoner in the Castle of *Lidford*, and also to do nothing whereby he shall in the Law be deemed out of Prison, and other Articles comprised in the said Condition, the which the said *Richard* perfectly remembereth not:' Wherefore the Premises by your great Wisdoms tenderly considered, the said *Richard* humbly prayeth, that it may be ordained, established, and enacted, by the King our Sovereign Lord, and by the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the Authority of the same, that the said Condemnation and Condemnations of the said Hundred and threescore Pounds, and every Parcel thereof, and Judgments and Executions had or to be had for the same, and also the said Obligation and all Demands had or to be had for the Premises, or any of them, to be utterly void against the said *Richard*, and of none Effect.

Judgment against *Richard Strode* void.

II. And over that it be enacted by the said Authority, That all Suits, Accusements, Condemnations, Executions, Fines, Amerciaments, Punishments, Corrections, Grievances, Charges, and Impositions, put or had, or hereafter to be put or had unto or upon the said *Richard*, and to every other of the Person or Persons afore specified, that now be of this present Parliament, or that of any Parliament hereafter shall be, for any Bill, speaking, reasoning, or declaring of any Matter or Matters, concerning the Parliament to be communed and treated of, be utterly void and of none Effect.

Fines for Parliament Matters void.

III. And over that it be enacted by the said Authority, That if the said *Richard Strode*, or any or all the said other Person or Persons, hereafter be vexed, troubled, or otherwise charged for

Action on the Case given to the Party grieved.

any Cauſes, as is aforeſaid, that then he or they and every of them ſo vexed or troubled, of and for the ſame, to have Action upon the Caſe againſt every ſuch Perſon or Perſons ſo vexing or troubling any contrary to this Ordinance and Proviſion, in the which Action the Pary grieved ſhall recover Treble Damages and Coſts. And that no Protection, Eſſoign, nor Wager of Law in the ſaid Action in anywiſe be admitted or received.

Schedule referred to.

'BE it inquired for our Sovereign Lord the King, That whereas at the Parliament holden at *Crockerentor*, before *Thomas Denis*, Deputy to Sir *Henry Marnie* Knight, Warden of the Steinery, the Twenty-fourth Day of *September*, the Second Year of the Reign of King *Henry* the Eighth, It was ordained, eſtabliſhed, and enacted, that (from the Day aforeſaid) it ſhall be lawful for every Man to dig Tin within the County of *Devonſhire*, in all Places whereas Tin may be found; and alſo to carry the Water to their Works without any Let or Trouble of any Perſon or Perſons, according to our Uſages and Confirmations of our Charter, and according to our Cuſtom out of Mind; and if any Perſon or Perſons let, trouble, or vex any Man to dig Tin, or to carry Water for the ſame, contrary to our old Cuſtom and Uſage, and if it be found by the Verdict of Twelve Men at the Law Day, he that ſo letteth, vexeth or troubleth any ſuch Perſon or Perſons ſhall fall in the Penalty of Forty Pounds as oft as he ſo vexeth or troubleth: the One Half to my Lord Prince, and the other Half to him that was ſo letted, vexed, or troubled: And a *Fieri facias* to be awarded, as well for my Lord Prince as for the Party, if One *Richard Strode* of *Plimton*, Tinner, at the Parliament holden at *Weſtminſter* the Fourth Day of *February* laſt paſt, letted, vexed, and troubled One *William Read* the younger, and *Ellis Elford* Tinner, and all other Tinners in the ſame Parliament for digging of Tin in the ſeveral Soil of the ſaid *Richard* and other Perſons contrary to this our Act made.'

[*For the other Acts of this Year, uſually called* Private Acts, *See the Table of Titles at the Beginning of the Volume.*]

Their Lordſhips, or any Five of them, to meet on *Friday* Morning, at Nine of the Clock, in the Prince's Lodgings.

Meſſage from H. C. with Bill.

A Meſſage was brought from the Houſe of Commons, by Sir *Charles Harbord* and others; which conſiſted of theſe Particulars:

1. To preſent Two Bills, to which they deſire their Lordſhips Concurrence:

1. "An Act to regulate the Trade of Silk "Throwing."

2. "An Act to prevent Theft and Robberies on "the Highways."

2. To return the Bill concerning Sir *Thomas Hobbithwayte*, wherein they agree in leaving out the Proviſo.

3. They return the Bill for taxing Lands in the Great Level of the Fens, having amended it according to the Amendments agreed on by both Houſes.

* The Duke of *Richmond*, the Lord Great Chamberlain, the Earl of *Anglesey*, and the Lord *Paget*, are added to the Committee concerning *Thomas Skynner* and the *East India* Company.

Sir W. Ivan's Petition.

Ordered, That the Petition of Sir *William Ivan* ſhall be read To-morrow Morning.

Sir Wentworth againſt Ld. Lovelace.

Ordered, That on *Tueſday* next this Houſe will take into Conſideration what Reſolution to give in the Cauſe between the Lady *Wentworth*, and the Lord *Lovelace*.

Mildmay and Coniſb.

Ordered, That on *Tueſday* Morning next Counſel ſhall be heard concerning the Title to the Barony of Lord *Fitzwalter*.

Lucy's Bill.

Ordered, That the Bill for ſettling the Eſtate of Sir *Richard Lucy* ſhall be read To-morrow Morning.

Judgment upon Holles, &c. Reſolved, &c. to be affirmed in the King's Bench, nemine.

Whereas Counſel have been this Day heard, at the Bar, as well to argue the Errors aſſigned by the Lord *Holles*, Baron of *Ifield*, upon a Writ of Error depending in this Houſe, brought againſt a Judgement given in the Court of King's Bench, in 5^to^ *Caroli* Primi, againſt the ſaid Lord *Holles*, by the Name of *Denzell Holles* Eſquire, and others; as alſo to maintain and defend the ſaid Judgement on His Majeſty's Behalf:

Upon due Conſideration had of what hath been offered on both Parts thereupon, the Lords Spiritual and Temporal in Parliament aſſembled do order and adjudge, That the ſaid Judgement given in the Court of King's Bench in 5^to^ *Caroli* Primi, againſt the ſaid *Denzell Holles* and others, ſhall be reverſed.

The Form whereof (to be affixed to the Tranſcript of the Record) followeth:

"Et quia Curia Parliamenti, de Judicio ſuo, de & "ſuper præmiſſis reddend. nondum adviſatur, Dies "datus eſt tam prædicto *Galfr's Palmer* Mil. & Bar. "qui ſequitur, &c. quam prædicto *Denzel* Domino "*Hollis*, coram eâdem Curiâ, uſque ad Diem Mercurii "decimum quintum Diem Aprilis tunc prox. ſequent. "apud *Weſtm.* in Comitat. *Mid.* de Judicio ſuo "inde audiend. eo quod Curia prædicta nondum, &c. "Ad quem Diem coram Curiâ prædictâ venit tam "prædictus *Galfrid. Palmer* qui ſequitur, &c. quam "prædictus *Denzel* Dominus *Hollis*, in propriis Per-

* Vide p. 173. a.

"ſonis ſuis; ſuper quo, viſis & per eandem Curiam "nunc hic plenius intellectis omnibus & ſingulis præ-"miſſis, maturâque Deliberatione inde habitâ, conſi-"deratum eſt per Curiam prædictam, quod Judicium "prædictum, ob Errores prædict. & al. in Recordo "& Proceſſu prædictis compertos, revocetur, adnullie-"tur, & penitus pro nullo habeatur; et quod prædict. "*Denzell* Dominus *Hollis* ad omnia quæ idem *Denzell* "Dominus *Hollis* occaſione Judicii prædict. amiſit "reſtituatur."

Dominus Cuſtos Magni Sigilli declaravit præſens Parliamentum continuandum eſſe uſque in diem craſtinum, (*videlicet*,) 16^mum^ diem inſtantis Aprilis, hora decima Aurorâ, Dominis ſic decernentibus.

Adjourn.

DIE Jovis, 16° die Aprilis.

Domini tam Spirituales quam Temporales præſentes fuerunt:

His Royal Highneſs the Duke of *York*.

Arch. *Cant.*
Epus. *Durham.*
Epus. *Winton.*
Epus. *St. David's.*
Epus. *Hereford.*
Epus. *Ely.*
Epus. *Norwich.*
Epus. *Cheſter.*
Epus. *Sarum.*
Epus. *Petriburgh.*
Epus. *Carlile.*
Epus. *Rocheſter.*
Epus. *Oxon.*
Epus. *Lyncolne.*
Epus. *Exon.*

Sir *Orlando Bridgman*, Miles et Bar. Dns. Cuſtos Magni Sigilli.
Marq. *Worceſter.*
Edwardus Comes *Mancheſter*, Camerarius Hoſpitii.
Comes *Suffolk.*
Comes *Derſett.*
Comes *Bridgwater.*
Comes *Northton.*
Comes *Devon.*
Comes *Denbigh.*
Comes *Briſtol.*
Comes *Clare.*
Comes *Bolingbrooke.*
Comes *Berks.*
Comes *Dover.*
Comes *Petriburgh.*
Comes *Norwich.*
Comes *Eſſex.*
Comes *Cardigan.*
Comes *Bath.*
Comes *Carlile.*
Comes *Craven.*
Vicecomes *Say & Seale.*
Vicecomes *Hallifax.*

Dns. *Arlington*, One of the Principal Secretaries of State.
Dns. *Audley.*
Dns. *Berkley de Berk.*
Dns. *Windſor.*
Dns. *Eure.*
Dns. *Chandos.*
Dns. *Petre.*
Dns. *Arundell de Ward.*
Dns. *Howard de Charlt.*
Dns. *Grey.*
Dns. *Lovelace.*
Dns. *Poulet.*
Dns. *Maynard.*
Dns. *Powis.*
Dns. *Byron.*
Dns. *Ward.*
Dns. *Colepeper.*
Dns. *Lucas.*
Dns. *Bellaſis.*
Dns. *Gerard de Brand.*
Dns. *Wotton.*
Dns. *Berkley de Strat.*
Dns. *Holles.*
Dns. *Cornwallis.*
Dns. *Dulamer.*
Dns. *Aſhley.*
Dns. *Crewe.*
Dns. *Freſchville.*
Dns. *Arundell de Trer.*

PRAYERS.

Meſſage from H. C. with a Bill.

A Meſſage was brought from the Houſe of Commons, by Sir *Baynham Throgmorton* and others; who brought up a Bill, intituled, "An Act for the Increaſe "and Preſervation of Timber within the Foreſt of "*Deane*," to which they deſire their Lordſhips Concurrence.

Bill againſt Atheiſm, &c.

The Houſe was adjourned into a Committee, to take further Conſideration of the Bill againſt Atheiſm and Profaneneſs, &c.

The Houſe being reſumed;

The Lord Chamberlain reported, "That the Com-"mittee of the whole Houſe, taking into Debate the "Bill againſt Atheiſm, deſires that a Day may be ap-"pointed

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